Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

GERALDINE DAR DAR

Petitioner.

v.

ASSOCIATED OUTDOOR CLUBS, INC.
d/b/a TAMPA GREYHOUND TRACK

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

GERALDINE DAR DAR
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BEST AVAILABLE COPY

QUESTIONS PRESENTED

Petitioner, filed this civil action against Respondent, Associated Outdoor Clubs, Inc., d/b/a Tampa Greyhound Track under violations of Title VII and the Florida Civil Rights Act afforded to all individuals under the United States Constitution. The review of these legal issues are very important in that it address the basic constitutional rights of due process and fairness where Respondents are able to hire big law firms and frustrate the ordinary individual rights stipulated in the laws of the United States instead of honoring the laws. Respondent attempted to create a legal basis for the unwanted touching of Petitioner's buttocks and physical violence towards her, due to "a small and confined work area" without a written sexual harassment policy, retaliation policy and complaint procedure in place until April 1, 2005 [April Fool's Day], seven months prior to trial. Respondent requested the court system for judgment as a matter of law when in fact they were not in compliance with all applicable federal, state, local rules and equal employment opportunities laws, and a prohibition of sexual and other forms of harassment and discrimination.

1. Whether there is conflict between the circuits on causation and the anti-retaliation provision under Title VII.

QUESTIONS PRESENTED - Continued

2. Whether there is a conflict between the circuits on issues when allegations, statements, and incidents occurred in a vacuum, separate and distinct from the rest of the records during summary judgment.

3. Whether there is a conflict between the circuits on what constitutes hostile work environment harassment under the totality of the circumstances and to finally clarify Federal Rule of Civil Procedure, Rule 50(b).

PARTIES TO THE PROCEEDINGS

The parties below are listed in the caption, and are listed together with their attorney's address, as follows:

1. Geraldine Dar Dar, Pro Se

Plaintiff

Post Office Box 7102
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2. Associated Outdoor Clubs, Inc., d/b/a Tampa Greyhound Track, 8300 North Nebraska Avenue, Tampa, Florida 33604, Post Office Box 8096, Tampa, Florida 33674-8096

Defendant

John Michael Hater, Owner/General Manager of Associated Outdoor Clubs, Inc., d/b/a Tampa Greyhound Track, 8300 North Nebraska Avenue Tampa, Florida 33604 Post Office Box 8096, Tampa, Florida 33674-8096

Defendant

Mark E. Levitt, Allen, Norton & Blue, P.A., 324 South Hyde Park Avenue, Suite 225, Tampa, Florida 33606, Telephone (813) 251-1210 Facsimile: (813) 254-2006

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statements are applicable to the Defendant-Respondent, Associated Outdoor Clubs, Inc., d/b/a Tampa Greyhound Track, since, they are corporations and Owner/General Manager. [Defendant contends that they are independent of the other Associated Outdoor Clubs, Inc., which is incorporated with twenty tracks within the Florida area]. Plaintiff-Petitioner is an individual and without corporate affiliation and not a corporate entity.

Respectfully submitted,

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OPINION BELOW

The relevant orders by the district court (D.C. No. 8:04-01055-SCB-TBM). After **REVERSE. REMAND.** and **VACATE** (App. 13); **DENIED** New Trial (App. 36); Bench Trial (App. 38); and Summary Judgment (App. 50). The opinions by the 11th Circuit Appeal No. 06-10245DD. **REVERSE. REMAND.** and **VACATE.** (unpublished) (App. 24). and Appeal No. 07-10618DD **AFFIRMED** district court [in conflict with this Circuit's prior decision. the Supreme Court and other circuits. (App. 3) are reproduced in the Appendix. The Petitioner filed a Petition for Rehearing and Rehearing En Banc presenting constitutional issues again and its relevance under Title VII as well as the conflict under prior holding of this Court. The Petition was **DENIED** on October 30. 2007 (App. 1). This petition follows.

STATEMENT OF JURISDICTION

Pursuant to Supreme Court Rule 30.3 this Court has jurisdiction in that before the expiration of the 90 days after the Petition for Rehearing and Rehearing En Banc timely filed and **DENIED** October 30. 2007 (App. 1). Petitioner filed a Petition for Writ of Certiorari timely filed on January 27. 2008. Pursuant to Rule 14.5. the petition must be corrected to comply with the Rules of this Court and submitted to Office of the Clerk in corrected form within 60

days or the petition will not be filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND RELEVANT PROVISIONS INVOLVED

This action was brought against Respondent with EEOC alleging discrimination based on sex, race and retaliation pursuant to Title VII of the Civil Rights Act of 1964 and Florida Civil Rights Act of 1992. February 10, 2004, EEOC issued its "Right To Sue" giving Petitioner 90 days to sue. Petitioner obtained the Freedom of Information Act, Miami, Florida and Washington, D.C. (A4-05-FOIA-0620-MM) [Petitioner was slandered, defamed, and humiliated. The Respondent intentionally caused severe emotional distress upon Petitioner] (SAC[1], Ex. A, B, C, D).

The continued actions against Respondent with Florida Commission on Human Relations issued its Notice of Dismissal and Right to Sue, therefore, pursuant to the authority of *Woodham v. Blue Cross & Blue Shield of Florida*, 829 So. 2d 891 (Fla. 2002), the Complainant may pursue this claim in the Division of Administrative Hearing (DOAH).

On May 31, 2004, Petitioner filed a Petition for Relief against Respondent pursuant to

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[1] Second Amended Complaint (hereafter "SAC")

Florida Civil Rights Act of 1992. Section 760.01-760.11, alleging unlawful employment practices by maintaining a racially and sexually hostile work environment and by terminating her in retaliation for complaining about the hostile work environment. The petition was not timely filed.

After exhausting her administrative remedies, May 10, 2004, Petitioner filed a Complaint in District Court Middle District of Florida; August 10, 2004, an Amended Complaint was filed; and October 18, 2004, a Second Amended Complaint was filed alleging sex discrimination hostile work environment and vicarious retaliation by the supervisors because she opposed unlawful employment acts pursuant Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1), the Florida Civil Rights Act of 1991, Florida Civil Rights Act of 1992 § 760, American with Disabilities Act, Sections § 12203(a) and § 12203(b).

STATEMENT OF THE CASE

Associated Outdoor Club d/b/a Tampa Greyhound Track (hereafter, "Respondent") operated under two seasons per year: Simulcast season, January thru June; and Live season, July thru December. In July 1999, Respondent, hired

Petitioner (hereafter, "Petitioner") (46 year old, African American female). Ed Gilley, head supervisor, assigned Petitioner as roving clerk, job classification-pari mutuel clerk. Unlike other clerks, Petitioner walked with a small hand held computer, punching tickets for customers throughout the track and was not limited by waiting for customers to come to her. This job assignment brought more tips than that of the other clerks. The other clerks complained of the job assigned to Petitioner because she was a newcomer and the position was not offered to the other clerks. Thereafter, Petitioner's position was abolished and she was assigned to a stationary position behind the counter [line] with the other clerks. Petitioner did not complain about the new assignment.

During her employment behind the line, Petitioner began to complain to her supervisors and managers about various acts of unwanted touching of her buttocks and offending conduct: (1) Live season 2000, Grant constantly poking petitioner in her side while she's assisting customers (SAC, p12-13, #1); (2) Unwanted touching of her buttocks by Diez (once) at concession stand; (3) Chesser, Grant and Guzman constantly invited petitioner to drinking parties after working hours; in the event that she got intoxicated, they will take her to Chesser's house, where other co-workers usually sleep over, (followed by laughter and giggling (SAC, p12-13.

#1); (4) Simulcast 2000, 2001. Unwanted touching of Petitioner's buttocks by Capitano on Tuesdays and Thursdays during Chesser's shift (6 months intervals) (SAC p13-14, #2-3); (5) Jan. 12, 2002. Guzman's statement to petitioner that he saw a man in the men's room, UNZIP, UNTIE, UNWRAP, and a "whale of a dick" fell into the toilet (SAC, p14, #4-5)[2]; (6) Jan. 13, 2002. Guzman's statement to petitioner, "wouldn't you like to have a woman do things for you that Brodie does for me" (Brodie and Guzman were lovers at that time)(SAC, p15, #6-7); (7) Jan. 20, 2002. Guzman brushed petitioner shoulder and a violent argument erupted. Officer Kessler intereeded (SAC, p16, #8-9, p 24, #18);(8) End of Jan., 2002. Brodie punched Petitioner on the shoulder.[3] (SAC, p18,#10-13); (9) Petitioner saw Brodie and Guzman on the street where lives (three occasions, they live 45 miles away) (SAC, p 23, #17c); (10) Brodie began to park wherever Petitioner parked her car, headlight to headlight (SAC, p 23, #17a); (11) Someone was letting air out of the tire of petitioner's car (each night she worked) (SAC, p 23, # 17b; p 25, #20); (12) Mar. 26, 2002, Unwanted touching of Petitioner's buttocks by Reker (occurred twice after being told not to do it after the first time); Berkobein called petitioner a liar regarding Reker touching her

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[2] Supervisors told Guzman to leave Petitioner alone and don't talk to her

[3] Appellant wore a bruise for two weeks, and needed spinal adjustment due to herniated disk in lower back

buttocks (SAC, p 20, #14-16); (13) Unwanted touching of Petitioner's buttocks by Malizo (SAC, p 25, #20); (14) Oct - Nov. 2002, Bruner circulated a magazine among co-workers that sold ladies panties with built-in butt (SAC, p 26, #21); (15) Nov. 9, 2002, Diaz asked Petitioner if she wore panties with built-in butt. An argument erupted and Brodie called Petitioner "psycho" (SAC, p 26, #21-23); (16) Petitioner immediately went to Hall to report the incident that had just occurred and to inquire about the status of her complaints she made to the supervisors. Hall said he had no knowledge of her complaints; Petitioner almost had a nervous breakdown in his office (SAC, p 27, #23-24); (17) Early February, 2003, Berkobein told [lied] Petitioner that Horton's mother had aneurysm caused confusion between Horton and Petitioner (SAC, p 39, # 1e); (18) Customers told Petitioner that Horton said that "when Petitioner was not at work she's making porno movies" (SAC, p 29 #25); (19) May 16, 2003, Customer called Petitioner "a lazy mother fucker" because she was leaving for lunch [scheduled, since 1999] (emphasis added); May 16, 2003, (9:00-11:00 pm) Horton argued when Petitioner received a $50.00 tip from a customer, and she received $10.00, customer said "don't be jealous" she replied loudly, "jealous of what, she ain't got shit" (SAC, p 41.#a); (20) May 17, 2003 (at 12:00 pm, until 12:00 am.) continued harassment, belittled, humiliated, in front of customers. Horton's topic: "jealous of what, she ain't got shit" (SAC, Ex J); May 18, 2003.

scheduled day off (SAC. p 42. #b. Ex. J): (May 19. 2003. Chesser called Petitioner at home and said. "We decided to terminate you" and hung up the telephone) (SAC. p 43. #c. d. e): (21) Respondent withheld monies owed to Petitioner after termination. Sept. 30. 2003. Petitioner filed a complaint with EEOC. Oct 4. 2003. Respondent sent Petitioner to a collection agency: Petitioner contacted the United States Department of Labor. The Department of Labor informed Respondent that they owed Petitioner $70.01. On December 5. 2003. Respondent sent Petitioner a check in the amount owed. The collection agency dismissed the case. (SAC. p 45-46. #b. Ex I).

Petitioner received unemployment benefit.

During Preliminary Pre-Trial Conference (December. 2004) district court **DENIED** Petitioner's right to request punitive damages (Doc. 80. 28:24-29:13; Doc. 80. 30:7-22): (also. Petitioner's request for punitive damages was not mentioned during Jury Instructions at Bench Trial).[1]

The district court notes that Respondent did not have a written sexual harassment policy during

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[1] Petitioner was ordered to her first mediation with former Judge Edward Ward **(Doc. 42)** [who resigned from the Bench when allegations of sexual harassment surfaced against three female judges and their assistants].

Petitioner's employment. (App. 53, fn 21). District court evaluated only ten (10) of Petitioner's twenty-one (21) allegations": 1) a male clerk poked her in her side; 2)[6] her co-workers invited her to accompany them for a drink after work; 3) Guzman asked her if she wanted a woman to bring her food, like Charlyn Brodie brought him food; 4) Guzman bumped her shoulder after Petitioner complained about him; 5) she saw Brodie and Guzman on the street she lived on; 6) unknown people were letting air out of her tire; 7) she witness a female clerk bring a magazine that sold underwear with a "built-in butt; 8) clerk, Diaz asked her whether she ever seen such an apparatus; 9) Guzman told her that while he was in the men's restroom, he saw an individual's "whale of a dick"; 10) she was touched repeatedly on her buttock by other clerks including Capitano and Reker."., (App. 62).

The district court made credibility determination by determining that the incidents were not gender-based and did not form a part of the context of the environment.

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stating, "Additionally, Plaintiff states in her deposition that the following incidents also created a hostile work environment, but these incidents were not addressed by defendant" (App. 62 fn 31). [Petitioner refers to the other remaining incidents as Undisputed Facts]

[6] It is unclear as to who exactly invited her out. Plaintiff merely refers to these co-workers as "they" in her deposition (App. 55, fn 25).

Based on this misapplication of law, the Court **GRANTED** in part and **DENIED** in part Defendant's motion for summary judgment regarding Plaintiff's hostile work environment claim. The Court **DENIED** the motion only to the extent that Plaintiff contends that she was subjected to a sexually hostile work environment due to people touching her butt.

However, the Court **GRANTED** summary judgment in favor of Respondent regarding all of the other alleged incidents that Plaintiff contends created a sexually hostile work environment" (App. 69).

"The Court further noted that Defendant asserts a legitimate, non-discriminatory reason for terminating Plaintiff- failing to comply with customer courtesy. However, Plaintiff brought forth evidence (in the form of Meissner's deposition testimony) that created a genuine issue of material fact as to whether Defendant's purported reason is pretexual[7]. Accordingly, the Court **DENIED** Defendant's motion for

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[7] Additionally, the Court notes that Plaintiff argues that she was terminated due to her outbursts to co-workers, which occurred whenever they would touch her in a manner that she deemed inappropriate (Doc. No. 76, p. 13). Furthermore, it appears that Plaintiff may be questioning the legitimacy of the complaints that occurred at the Track were logged (Doc. 76, p 15-16, 20).

Petitioner contends that district court did not look at the other incidents that would dissuade a person from filing a complaint (App. 62, fn 31; App 68, fn 36).

judgment on Plaintiff's retaliation claim based on her termination" (App. 68).

At trial, from the Bench, district court stated:

> "On page two of your findings you talk about your hostile work environment claim. And you say: Plaintiff argued that she was subjected to a hostile work environment regarding, one Guzman's discussions about a man's genitalia that he saw in the men's restroom; and two, Diez asking plaintiff if she wore underwear with a built-in-butt.
>
> The only issue as far as hostile work environment, and the only one that I'll entertain any type of evidence about, is the touching of your buttocks and those--those particular events related to that. You also obviously have the retaliation claim, but those two examples that you used in your proposed findings I already said in my order on summary judgment that - - I entered judgment for the defendant on those, that those were not proper arguments for a hostile working environment based on sex, so or gender.

> So I just wanted to alert you to the fact that I will not entertain any kind of evidence on those two issues.
>
> The other thing I just want to remind you of, is there are two issues left for trial. One is the hostile work environment claim that I just talked about, and that is based strictly on touching your buttocks. The second is retaliation. Everything else went out on the order on the motion for summary judgment." (TT1, 8:10-9:2)
>
> "Sex discrimination and hostile work environment affirmative with being permitted by the supervisors." (TT2, 235:2-4)

In the 11th Circuit Court of Appeal No. 06-10245, Dar Dar argues that district court erred in approximately thirteen ways. These arguments are best divided into three general contentions: 1) the district court erred in granting partial summary judgment, 2) the court erred in entering judgment for AOC on the hostile work environment claim, and 3) the court erred by entering judgment for AOC on the retaliation claim (App. 25).

Dar Dar's first contention is that the district court erred by granting summary judgment to AOC as to most of the alleged incidents of harassment. She argues that each incident is relevant to establish a hostile work environment and that the district court incorrectly considered the alleged incidents of sexual harassment in isolation rather than as a whole (App. 26).

"Consequently, we **AFFIRM** the district court partial grant of summary judgment as to incident one through seven and **REVERSE** it as to incidents eight and nine" (App. 30).

However, the district court need not conduct any additional evidentiary proceedings on **REMAND** if it determines that even if Dar Dar's allegation about incidents eight and nine are true, that conduct when added to incident ten still does not total sexual harassment. We leave that decision to the district court (App. 31).

Dar Dar's second contention is that the district court erred in entering judgment for AOC on her hostile work environment claim. Because the district court did not consider evidence of two relevant instances of conduct at trial, we cannot determine how it would have ruled had it done so. Therefore, we **VACATE** the order entering judgment on Dar Dar's hostile work environment claim and **REMAND**

for a determination as to whether consideration of these additional instances alters the court's resolution of that claim. What we said in the previous paragraph about the possibility that no new evidentiary proceedings will be required applies here as well (App. 31).

Finally, Dar Dar contends that the district court erred when it entered judgment for AOC on her retaliation claim (App. 32).

We grant deference to the credibility determination of the district court, *Burrell*, 125 F.3d at 1394, and find that it did not clearly err. We therefore **AFFIRM** the judgment in favor of AOC on Dar Dar's retaliation claim (App. 34).

The district found that Dar Dar's complaints of harassment could constitute statutorily protected activity and that her termination was an adverse employment action[5] (App. 33). However, the court concluded that she failed to prove causation by a preponderance of the evidence..... (App. 33).

In the District Court's Order After **REVERSE, REMAND** and **VACATE** - The Court finds in favor of Defendant on Plaintiff's hostile work environment claims (App. 21).

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[5] "..... The creation of a complaint log only becomes "material to a reasonable employee" once the employer uses that log as the basis for disciplining or terminating the employee. ***Burlington***, U.S. at , 126 S.Ct. at 2409. Thus, Dar Dar's termination was the adverse action, not the creation of the complaint log.

District court stated that Dar Dar did not prove by a preponderance of the evidence that the sexual harassment resulted in a hostile work environment (App. 21).

On Appeal No. 07-10618DD, We **AFFIRM** the summary judgment for Associated on her retaliation claims and agreed with the district court that the majority of incidents alleged by Dar Dar to have created a hostile work environment were insufficient as a matter of law to support such a claim (App. 4). We **AFFIRM** District Court decision on **REMAND** (App. 9).

Dar Dar contends that this Court erred in the first appeal by not directing the district on **REMAND** to consider evidence of the other non-sexual incidents that we concluded in the first appeal were insufficient as a matter of law to support a hostile work environment claim and to consider AOC's alleged failure to take effective action to address Dar Dar's complaints. Because we already ruled on these matters, however, ..." (App. 6).

The Petition for Rehearing is **DENIED** and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rule of Appellate Procedure), the Petition for Rehearing En Banc is **DENIED** (App. 2).

....

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in the instant case, because most of the circuits are divided on the issue of what should be considered under the totality of the circumstances in a gender based or non-gender based issue that forms a part of the context of the 'environment'. This Court has explicitly explained that it is the 'environment' when looking at a harassment case subjectively that must be viewed in context to determine whether the environment is severe or pervasive and no set of facts should be viewed as isolated incidents. Furthermore, most of the circuits require that the acts or incidents be sexual in nature in the context of the environment.

Petitioner requests this Court to clarify the issue that the circuit court cannot inquire whether the alleged conduct was severe or pervasive without knowing how severe and pervasive it must be. Thereafter, district court, in its own words from the bench, had no intention of entertaining the evidence presented at trial; and whether the district court caused a manifest injustice at summary judgment by granting credibility determination, by weighing the evidence and drawing legitimate inference from the facts which are jury functions and not those of the judge.

Petitioner request certiorari to be granted to

resolve conflict in the circuits when district court errs in granting summary judgment to a Defendant and on appeal, when these issues were remanded back to the court for consideration of additional evidence.

Petitioner request this Court to determine whether Petitioner's substantial due process was violated when district court held no evidentiary hearing to hear the evidence in light of the remand.

Petitioner request this Court to determine whether the district court was correct in denying Petitioner's punitive damages claim during Preliminary Pre-Trial Conference December, 2004.

Finally, Petitioner contends that certiorari is warranted to determine the conflict between the circuits on the old anti-retaliation provision and the key language of the anti-retaliation and the anti-discrimination provisions, to determine whether Petitioner presented evidence of discrimination when the supervisor's log was created and used against her thereby creating a material change in the terms and conditions of her employment.

1. Certiorari Should Be Granted To Resolve The Conflict Between the Circuits on Causation And The Anti-Retaliation Provision Under Title VII

Petitioner will demonstrate a split of authorities over the proper standard for actionable retaliation under Title VII of the Civil Rights Act of 1964. See *Norviello v. City of Boston*, 398 F.3d 76 (1st Cir., 2005), in this case involving a Title VII employment discrimination suit by a city employee, the First Circuit noted that "the weigh of authority supports the view that..... The creation and perpetuation of a hostile work environment can comprise a retaliatory adverse employment action, "citing the Second, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits as support. Id. at 89.

But the court noted that the Fourth and Eighth Circuits hold "that a hostile work environment cannot constitute a retaliatory adverse employment action instead, retaliation requires an 'ultimate employment decision... such as hiring, granting leave, discharging, promoting and compensating...Id. (quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir., 997). Ultimately, the First Circuit held "explicitly that a hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment action for purposes of 42 U.S.C. § 2000e-(3)." thus siding with the majority of the circuits and against the Fifth and Eighth Circuits. Id.

The Fifth Circuit considered several Title VII retaliation cases in the last year since the

Supreme Court's opinion in *Burlington Northern v. White* modified the Fifth Circuit's standards. In *Lee v. Department of Veterans Affairs*, 2007 WL 1747998 (5th Cir., 2007) (unpublished), the court reversed and remanded a retaliation claim because it had been evaluated under the old "ultimate employment standard decision" standard.

In *Pryor v. Wolfe*, 196 Fed. Appx. 269 (5th Cir., 2006) (unpublished) the court held the plaintiff's retaliation claim was actionable under either the old standard or the new *Burlington* standard and reversed the district court. It found that the plaintiff's complaint · that M.D. Anderson withheld his paycheck in retaliation for his race discrimination complaint · would "almost certainly 'dissuade a reasonable worker from making or supporting a charge of discrimination." Id. at 263.

"This Court noted that the application of the Title VII anti-retaliation provision is not limited to an employer's employment related or workplace action." See *Burlington Northern*, 126 S.Ct. at 2405. In reaching its decision, the Court compared the key language of Title VII's anti-discrimination provision with the anti-retaliation provision. It noted that the anti-discrimination provision "explicitly limits the scope of that provision to actions that effect employment or alter the conditions of the workplace." However,

the Supreme Court also noted that "no such limiting words appeared in the anti-retaliation provision." Id at 2411-12.

Petitioner admits that she is layman of law, however, from the clear interpretation of this Court, the anti-retaliation provision states, "no such limiting words" concerning actions that affect employment or alter the conditions in the workplace. If this interpretation is correct, this Court must resolve further conflict within the circuits, because the 11th Circuit's opinion "district court found that Petitioner's complaint of harassment could constitute statutory protected activity and that her termination was an adverse employment action". However, the court concluded that Petitioner failed to prove causation by a preponderance of evidence (App. 33, 34). Apparently, the district court found that Petitioner had established that Respondent reason for firing her was pretexual (App. 68; App. 68, fn 36). However, the time span between the protected activity and the adverse employment action was not casually related (App. 47). Once again, from this Court's reading of the anti-retaliation provision, "there is no such limiting words appear in the anti-retaliation provision that effect the employment or alters the conditions of the workplace". If such reading is correct, then this Court must clarify "causation" between the Circuits, to clarify, the true meaning of the anti-retaliation provision. § 703(a) anti-discrimination provision states: "It shall be an unlawful

employment practice of an employer

> 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."

> 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

and § 704(a) anti-retaliation provides impertinent part as follows:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful

> employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter".

The 11th Circuit noted, ".....The creation of a complaint log only becomes "material to a reasonable employee" once the employer uses that log as the basis for disciplining or terminating the employee. *Burlington*, ___ U.S. at ___, 126 S.Ct. at 2409. Thus, Dar Dar's termination was the adverse action, not the creation of the complaint log." (App. 33, fn 8; App. 42, fn 12).

However, the 11th Circuit failed to explicitly determine whether the creation of the supervisor log was the causation between the unlawful employment practice and the adverse employment action.

A. Disparate Treatment

The 11th Circuit noted that, to establish racial discrimination, plaintiffs must show that they suffered an adverse employment action. But the court cited its previous opinion, in *Davis v. Town of Lake Park*, 245 F.3d 1252, 1240-41 (11th Cir., 2001), that held: 1) Not all employer conduct that negatively affects an employee "constitutes

adverse employment action." and. 2) To prove an adverse employment action, an employee "must show a serious and material change" in employment terms or privileges.

Moreover, an employee's subjective view of the significance and adversity of an employer's action does not control. "The employment action must be materially adverse as viewed by a reasonable person in the circumstances".

The court held that a written reprimand didn't constitute an adverse employment action, because it didn't lead to any tangible harm, such as lost pay or benefits or denial of a promotion.

At instant case, district court noted that Petitioner had brought evidence (in the form of Meissner[4]'s deposition testimony) that created a genuine issue of material fact as to whether Respondent's purported reason for terminating her was pretextual (App. 48). Furthermore, it appeared that Petitioner was questioning the legitimacy of the complaints that occurred at the Track were logged (App. 68, fn 36; App. 42, fn 12). District Court noted that Petitioner was terminated because of the complaints that were

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[4] Hall told Meissner that they wanted to fire Petitioner because she complained too much about people touching her butt, but they were afraid because she would go to the NAACP (TT1, 88:12-16).

logged (App. 34; App. 42 fn 12). March, 2002, Petitioner complained to Berkobein about the unwanted touching and he testified that Petitioner was trying to set them up for a big lawsuit (TT1, 210:3-24) and that he wanted to terminate Petitioner, but it was not his decision to make at that time (Berkobein, depo 21:5-7).

Berkobein gave conflicting testimony stating that he did not write Petitioner's termination letter (Berkobein, depo 25:12-14; 27:23-25) and finally testifying at trial that he did write Petitioner's termination letter (TT1, 221:21-224:18). *Burlington*, __ U.S. at __, 126 S.Ct. 2409 (App. 33, fn 8). (emphasis added)

At instant case, Respondent operated a business since 1936 without any documentation of employees' performance[10]. The record states that on November 9, 2002, Petitioner went to Larry Hall. Hall testified that he gave Petitioner's complaints back to the supervisors (Hall, depo. 24:1-5). January, 2003 the supervisors created the Supervisor's Log. The creation of the log became "material" and formed the basis for the material change in Petitioner's employment terms

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[10] The record shows that Respondent established its first written sexual harassment policy, complaint procedure and retaliation policy on April 1, 2005 seven months prior to trial (Pla Ex 52) (emphasis added). The employees of Respondent's business were not credible in discussing that there was no written policy prior to April 1, 2005.(App. 53, fn 21).[An attempt to fraud the Courts].

or privileges [adverse employment action] or a legitimate, non-discriminatory reason for terminating Petitioner [Hater, Owner/General Manager testified that he did not investigate to determine whether Petitioner's termination was of a retaliatory or discriminatory nature (TT1, 49:7-13)]. District court stated that "defendant has said, I am telling you a non-discriminatory reason we fired Ms. Dar Dar....." (TT2, 239:16-20).

Complaints logged into the Supervisor Log (Pla Ex 50):

1) Page 7, Marlow Spivey, rude to customer, one more complaint employee gets one month off warn by myself (Chessser) 2/4/03 (TT2, 57:-58:3); (TT2, 84:2-85:9).

2) Page 8, Jerry Dardar, REPRIMANDED, rude to patron. She was warned for last time. ONE MORE COMPLAINT, OUT OF HERE. 2/8/03 (Chesser) (TT2, 67:3-68:17); (TT2, 85:-87:11).

Chesser testified that the supervisor's log was created by the supervisors, Jan. 2003 and prior to that time. Dar Dar had many customer complaints. The customers' complaints were "her rump"; "her rump, her rear end" (TT2, 98:16-100:10) (App. 42 fn 13).

3) Page 14, May 19, 2003, Dardar, (TERMINATED), refusing to wait on customer, (Chessser).

Chessser testified that he recommended Dar Dar to be terminated] (TT2. 101:18-102:1).

4) Page 15. May 24. 2003. Jerry Dardar. customer informs me that Dardar is a rude individual Josh Mannis (Pla Ex 56) (Chesser).

(later Gilley scratched Mannis name and inserted Willie Jackson (Pla Ex 50. p 15). Gilley and Chesser gave conflicting testimony at trial) (App. 42. fn 12) (TT2. 15:13-18:25); Chesser testified that both Mannis and Jackson came in on the same day. May 24. 2003 (TT2. 79:9-83:8); (COURT. TT2. 228:21-229:10).

5) Page 22. Georgia Bertrand discussed complaints from customers alleging missing tickets and short changing customer (3rd complaint inside a month) (Chesser).

6) Page 23. Guzman. Window #503 several complaints were made by patrons. Patrons complained teller was very combative and very rude. After talking with teller noticed he was intoxicated and was ask if he had been drinking he admitted that he had been. Teller sent home for day. Also was told last chance (Chesser) (Gilley. TT2. 62:-63:10) (Chesser. TT2. 91:14-23).

Gilley testified [defending Guzman's reprimand], "he wasn't really rude. The customers and the tellers communicate with each other. a lot of time the customers could be wrong" (TT2. 75:7-12).

7) Page 28. Bertand caught stealing patrons ticket. Reprimanded and warned. If any: any complaint comes back on this employee she is to be dismissed. She offered no explanation to customer nor to Gilley, who was the supervisor on the floor (Chesser) (Gilley, TT2. 65:7-20).

B. Retaliation

In *Gupta*, 212 F.3d 571, 585 (11th Cir., 2000) the Supreme Court held that the supervisor's conduct, while perhaps "annoying or inappropriate," was not sufficiently serious to support a sexual harassment claim. Id.

In light of *Faragher*, 534 U.S. 775 (1998), *Ellerth*, 525 U.S. 742 (1998), and *Kolstad v. American Dental Ass'n*, 119 S.Ct. 2118 (1999) in EEOC's Guidelines states, "A written sexual harassment policy should typically begin with a general statement of the employer's intention to comply with all applicable federal, state, local rules and equal employment opportunities laws, and a prohibition of sexual and other forms of harassment and discrimination. Some other issues relating to sexual harassment prevention that should be addressed by employers, although they may be handled more appropriately through separate company policies, include manager-subordinate romances,[11] conduct at company-

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[11] Even if such relationships are truly consensual, they involve substantial risks of litigation and liability. Developing a policy to address such relationships is difficult. A complete ban may be difficult to enforce and may have negative morale consequences.

sponsored entertainment events and business trips.[12]....."

However, when harassment is found against a supervisor, our Supreme Court has concluded that an employer will be held strictly liable for equitable damages -- that is, directly responsible, without regard to fault, for restoring an aggrieved party to the terms, conditions and privileges they would have enjoyed but for the harassment. This may include hiring or reinstating the victim, disciplining, transferring or firing the harasser, providing back pay and front pay (punitive damages may also apply) and taking preventative and remedial measures at the workplace.

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possibly even forcing good employees to leave. Alternatively, disclosure of such relationships can be required, so the employer can be alert to and warn the parties against any possible favoritism, indiscreet conduct, or coercion....."

Gilley testified that he dated both. Mary Horton and Vinson (Gilley depo 33:14-34:9) *Splunge v. Shoney's Inc.*, 97 F.3d 488, 40 (11th Cir. 1996).

[12] Many sexual harassment cases involve conduct during company-sponsored parties, so it may be appropriate to eliminate or limit alcohol consumption at such events and take other steps to keep them from getting out of hand. Similarly, harassment often occurs during business travel, and a policy against visitation of customers or other employees in their hotel rooms or late at night could help keep employees out of trouble. See, e.g., *Brown v. Perry*, 184 F.3d 388 (4th Cir. 1999) (sexual harassment allegations arising out of non-mandatory evening social gathering in supervisor's hotel suite during business conference).

District Court denied Petitioner the right to claim punitive damages during Preliminary Pretrial Conference without hearing the evidence of the trial (Doc. 80, 28:24-29:13; 30:7-22); also, omitted punitive damages from Jury Instructions at Bench Trial.

EEOC v. Stock, Inc. 2007 WL 11191186 (6th Cir., 2007) (Unpublished) The court reversed the entire case based on the district court's erroneous refusal to submit a punitive damage claim requested by Plaintiff in a sexual harassment and retaliation claim. The court found the employer/owner's comments sufficient to raise a fact issue as to malice or reckless indifference sufficient to support an award of punitive damages. Id.

At instant case, the supervisor, Chesser, (Grant and Guzman, included) constantly invited Petitioner to drinking parties after working hours and in the event, she became impaired, they will take her to Chesser's house; followed by laughter and giggling. Petitioner declined all invitations.

Petitioner states that Chesser, logged all of the complaints against her and could not properly explain the tampering with the supervisor's log (App. 42 fn 12; App. 42 fn 13) (Pla Ex 50, 56). Chesser continued to log complaints against Petitioner after she was terminated. (Petitioner was terminated on May 19, 2003 (stating:

Refusing to wait on customer (she was not at work that day)) and a complaint was logged on May 24, 2003 (stating Dar Dar an unpleasant individual and very rude). Terminated letter stated, Occurrence date: May 19, 2003, Today's date: May 19, 2003 Explanation: "Rude to customers and co-workers been warned during the year" (written by Berkobein; signed by Hall) (Pla Ex 56). Chesser allowed the unwanted touching to continue during his shift (Berkobein's Note Pla Ex. 54, stating ".....these incidents happen during Chesser's shift").

The supervisors and managers [decision makers] knew of Petitioner's complaints at the time of termination. The district court stated, "Chesser warned plaintiff that if there was one more complaint, he would fire her (App. 41); (App. 48).

The record shows, that the district court stated, "Sex discrimination and hostile work environment affirmative with being permitted by the supervisors" (TT2, 235:2-4).[13]

See e.g. *Hurley v. Atlantic City Police Dept.* 174 F.3d 95, 118 (3rd Cir., 1999) "*Ellerth* and *Faragher* do not ... focus mechanically on the formal existence of a sexual harassment policy"; if not effectively enforced, such a policy is no defense).

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[13] Berkobein testified that he investigatives by looking at a person's eyes. Many times the eyes say something other than what the mouth is saying (Berkobein depo. 21:17-22:6); (See Pla Ex 54)

The Supreme Court reversed, reinstating the judgment for the plaintiff. It conducted a thorough and extensive analysis of the agency law, discussing the possibility of basing liability on the theory that the supervisors were acting within the scope of their employment when they engaged in the harassment or on the theory that the supervisor's agency relationship with the employer aided them in committing the harassment. The Court rejected the scope-of-employment theory and concluded that "the aided-by-agency relationship principle... provides an appropriate starting point." *Faragher*, 864 F.Supp. 1552 (S.D. Fla. 1994). Because "there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship." Id. at 782 (the agency relationship affords contact with an employee subjected to a supervisor's sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior. When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position....") however, unrestricted application of this principle could result in employers always being vicariously liable for supervisory harassment."

Therefore, *Gupta* should be abrogated as a governing precedent in a *quid pro quo* harassment

case when the supervisor's advances are rejected and the victim is reprimanded [Chesser], "papering occurred" [Chesser], and recommended termination [Chesser] (App. 42).

At instant case, the Respondent employed 223 employees (three were black), according to their adversity report filed with EEO, September, 2003. A negative Personnel Action Form (termination letter), stating, "rude to customers and co-workers" (App. 68, fn 36); (App. 65, fn 34).

1) Respondent withheld Petitioner's monies after she was terminated (See STATEMENT, p 7, #21) *Pryor v. Wolfe*, 196 Fed. Appx. 269 (5th Cir., 2006) (unpublished). Petitioner states that the issues that were not addressed by defendant and district court are UNDISPUTED FACTS (App. 62 fn 31). Thus, in accordance with Rule 12(b)(d) dismissal of this claim was improper.

2) At the time of termination, supervisors and management knew of Petitioner's protected activity. Obviously, in determining the decision maker had prior knowledge of the protected activity, it is essential to identify who the decision makers are. Employers are well advised to the extent possible to segregate employees who deal with employee complaints and those who are

responsible for making decisions regarding tangible employment actions; the more segregated this function are, the lower probability that a decision maker will have prior knowledge of protected activity. See *Fenton v. Hisan*, Inc. 174. F.3d 827, 831-32 (6th Cir., 1999). A supervisor need not be empowered to make final determinations with respect to an employee's ultimate employment decisions to be considered a supervisor for Title VII purposes. *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir., 1979).

This court should find that the Respondent supervisor, Howard Chesser would invite Petitioner to drinking parties after work, and told her that if she got drunk, they will take her to his [Chesser] house. Petitioner refused all invitations, partly because of the gossip that came back to work as a result of the drunkenness and her personal survey that showed, not many females attended the parties and/or sleepovers. Petitioner feared that once Chesser became her supervisor that he would hold a grudge against her for not attending the parties, she was right.

Chesser, supervisor, who invited Petitioner to drinking parties allowed [high school classmates[14] and drinking buddies[15]] to harass Petitioner each time she worked. Whenever Petitioner complained

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[14] Capitano, depo 10:2

[15] See Disparate Treatment, #6 (Guzman intoxicated at work)

about the unwanted touching. Chessser would ignore the complaints. Throughout Petitioner's employment she kept asking for assistant from the supervisors. All of the complaints logged against Petitioner were by Chesser and he was the supervisor that actually fired Petitioner. (See *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir., 1979); *Fenton v. Hisan*, Inc. 174, F.3d 827, 831-32 (6th Cir., 1999).

Respondent was aware that Chesser was one of the supervisors who dealt with Petitioner's complaints and was responsible for the adverse employment action. (TT2, 101:18-102:1)

2. Certiorari Should Be Granted To Resolve Conflict Between The Circuits On The Issues Of When Allegations, Statements, And Incidents Occurred In A Vacuum, Separate And Distinct From The Rest Of The Record During Summary Judgment.

This Court has ordered that in considering summary dismissal "the court must draw all reasonable inferences in favor of the non-moving party and it may not make credibility determination or weigh the evidence". *Reeves*, 120 S.Ct. at 2110. In *Reeves*, this court also cited *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255, ordering that "credibility determination, the weight of the evidence and the drawing of legitimate inference from the facts are jury function not those of the judge".

The Tenth Circuit has emphasized that we must draw all inferences in favor of the party opposing summary judgment. *Prajillo v. Univ. of Colorado. Health Sciences Cntr.*, 157. F.3d 1211. 1213 (10th Cir., 1998) (stating that in reviewing summary judgment disposition Courts draw all reasonable inferences in favor of the non-moving party): *Curtis v. Oklahoma City Pub. Sch. Bd. of Educ.*, 147 F.3d 1200. 1214 (10th Cir., 1998). ("in determining whether a genuine issue of material fact exists. the court must draw all reasonable inference in favor of the non-moving party"). In a sexual harassment case. the district court should view the evidence in context not simply in it segmented parts. This Court has described the inquiry governing the evaluation of a hostile work environment claims as follows: (the existence of sexual harassment must be determined in light of the record as a whole. and the tier of facts must examine the totality of the circumstances. including context in which the alleged incident occurred". *Perry v. Federal Home Loan of Topeka*. 155 F.3d 1257. 1262 (10th Cir., 1998) (quoting *Meritor Savings Bank v. Vinson*. 477 U.S. 57. 69. 91 L.Ed 2d 49. 106 S.Ct. 2399 (1996). cert. denied. 526 U.S. 1039. 119 S.Ct. 1334. (1999). Such a thorough examination of the record is required because "the very term 'environment' indicate that allegedly discriminatory incidents should not be examined in isolation." Id. under this interpretation because conduct is not a gender

base may form a part of the context or environment in which the discriminatory conduct is alleged to have occurred, such conduct maybe relevant to, and should be considered in, evaluating a hostile work environment claim. In *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir., 1987), that court held "that evidence of a general work atmosphere ...as well, as evidence of specific hostility toward the plaintiff—is an important factor in evaluating the claim." Thus, even if some of the alleged conduct was not "explicitly sexual in nature", *Smith v. St. Lois Univ.*, 109 F.3d 1261, 1265 (1997) (citation omitted). If it reasonably could be inferred that the conduct was related to gender or arose out of the context in which admittedly sex and gender related conduct occurred, then it is for the factfinder to decide whether such an inference should be drawn. *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir., 1994) (explaining that "because discrimination cases often depends on inferences rather than direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the non-moving party".

Other circuits have held that in order for a plaintiff to prevail [s]he must prove that the incidents were based on her sex in the 'environment' thereby limiting the plaintiff ability to prove a prima facie case of a hostile environment. *Lack v. Walmart Store, Inc.* 240

F.3d 253 (4th Cir., 2001); *Mendoza*, 195 F.3d. 1238, 1246 (11th Cir., 1999).

In the instant case, the district court should have reviewed the case in context rather than breaking each incident into isolation. There should have been a thorough examination of the records, depositions, interrogatories, and admissions. The term 'environment' indicates that allegedly discriminatory conduct should not be examined in isolation like the district court did. The conduct that is not gender based may form a part of the context of an 'environment' in which discriminatory conduct is alleged to occurred, such conduct may be relevant to and should be considered in evaluating a hostile work environment claim. The district court dissected Petitioner's case as these allegations, statements, and incidents occurred in vacuum, separate and distinct from the rest of the record. As if, no two incidents were related; as if, no people influenced each other; or acted in concert, and if all the defendants assertions were true. However, district court is required by the Supreme Court of the land to consider all evidence in context of the complete case, not in piece meal and is required to draw all necessary inferences in light most favorable to the plaintiff. It is reasonable to believe that the incidents concerning unwanted touching by co-workers a driving force that the

other incidents derived from. 1) the statement by [16]Guzman "unzip, untie, unwrap and a whale of a dick fell in the water" was sexual in nature, however, when the Petitioner complained about his harassing conduct to the supervisor, Brodie began to harass the Petitioner by punching her and making explicit statements towards her in continuance of the gender base or closely related. At trial, supervisors testified that they investigated Petitioner's complaints against Guzman: they verbally reprimanded him on several occasions, however, there were no repercussion from the reprimands. The physical unwanted touching by Capitano was gender based and the Respondent based the touching on the area being too small and the district court granted credibility to the supervisors and Capitano[17] (App. 19), (App. 51 fn 20), (App. 16). However, a reasonable person in Capitano's position with numerous complaints by the Petitioner to the supervisors concerning unwanted touching.

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[16] Guzman's harassing conduct towards Petitioner, See Statement #3, #5, #6, #7 [Officer Kessler's subpoena was quashed **(Doc. 112)**], #8, #9, #10, #11, #15.

[17] Capitano testified, "Well, I just won't tease with people no more. You know what I mean? If people are going to try and get you for sexual harassment for having fun." (Capitano depo 37:20-22).

Capitano testified that he touched other females and they did not blow up or nothing (Capitano depo 22:19-22). At trial, he testified that he bumped into fire extinguisher but not no other people (TT1, 231:22-231).

common sense would tell you to go the other way. Additionally, district court granted credibility to Reker, a very petite Asian woman who carried an oxygen tank [at trial] (App. 15)[18]. Each incident that petitioner alleged was like reading a book, if you read the whole book, you could see the hostile environment however if you skipped two or three chapters, it would be difficult to see the environment as hostile. This is why it is of great constitutional value to have all the circuits comply with this Court's precedence. Therefore, no other individual of our great country would have to suffer the emotional distress that Petitioner has endured.

On Appeal, the 11th Circuit agreed with district court that the first seven incidents were not based on Petitioner's gender or sex. However, 11th Circuit analysis (No. 07-10618DD) is not consistent with its prior opinion (No. 06-10245DD)[19] and other circuits, nor with this Court's precedent. See *Harris*, 510 U.S. at 25, 114

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[18] Chesser testified that he talked to Reker about the incident and "she's just - she's fun. She's a lot of fun. And I talked to her about it, and she said that she had done what she did in jest." (TT2, 95:7-10). "She did it for fun" (TT2, 95:12).

Reker testified that she touched Petitioner's butt again, after she was told not to (TT1, 112:10-13).

[19] "Breaking the alleged harassing conduct down act-by-act and then concluding that each act is "isolated" is a bit like executing a self-fulfilling prophecy; every act viewed individually appears isolated" (App. 30).

S.Ct. 367; *Anders*, 895 F.2d at 1485. ("[t]he offensive conduct is not necessary require sexual overtones in every instance"); *Lipsett v. Univ. of Puerto*, 846 F.2d 881, 905 (1st Cir., 1998) "[verbal attack] although not explicitly sexual was nonetheless charged with anti-female animus and therefore, could be found to have contributed significantly to the hostile 'environment'. *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir., 1988) ("intimidation and hostility towards women because they are women can obvious result from conduct other than sexual advances"). *Hicks*, 833 F.2d 1406, 1415 (10th Cir., 1977) (rejecting narrow definition of sexual harassment that require predicate acts to be clearly sexual in nature) *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir., 1985) (we have never held that sexual harassment or other unequal treatment of an employee or a group of employees that occurs because of the sex of the employee must, be illegal under Title VII, takes a form of sexual advances or of other incidents with clearly overtone and we decline to do so now."); Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1764-74 (1998).

District court stated "there was so many complaints about things that were bad some sexual, some not sexual, sort of coupled together" (TT2, 239:11-15). In its view, the court recognized that some of the incidents were sexual and some were not however, the court did not

determine whether these incidents formed a part of the context of the environment. District court went outside the scope of its authority by weighing the evidence and making credibility determination and drawing legitimate inferences from the facts, when that was a function of the jury during a trial not during summary judgment.

3. Certiorari Should Be Granted To Resolve The Circuits On What Constitutes Hostile Work Environment Harassment Under the Totality Of The Circumstances And To Finally Clarify Federal Rule of Civil Procedure 50(b)

The 11th Circuit states in its' opinion. "Establishing that harassing conduct was sufficiently severe or pervasive to alter an employee's terms and conditions of employment includes a subjective and an objective" *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir., 1999) (App 27). Whether the objective component has been satisfied "can be determined only by looking at all of the circumstances". *Harris*, 510 U.S. at 23, 114 S.Ct. at 37. Courts must "examine the conduct in context, not as isolated acts, and determine under the totality of the circumstances whether the harassing conduct is sufficiently severe or pervasive" to create a hostile working environment. *Mendoza*, 195 F.3d at 1246.

At instant case, the 11th Circuit was not aware

of the 21 acts of conduct that Petitioner initially filed (SAC). (however, Petitioner did establish the sexual and non-sexual incidents in appeals that were not addressed by the district) (App. 5). before the district court caused a manifest injustice (TT1. 9:15-20). *Vance v. Southern Bell Telephone and Telegraph Co.*, 853. F.2d 1503 (11th Cir., 1989) (this court set forth an analytical framework for deciding when. under the totality of the circumstances. the plaintiff's case of harassment to sufficient to withstand a defendant's motion for summary judgment). The question in *Vance* was "whether the plaintiff's case was sufficient to withstand a motion for summary judgment notwithstanding the verdict under Fed. R. Civ. P., Rule 50(b). Rule 50(b) has not been amended to substitute the term "judgment as a matter of law" for direct verdict and JNOW. In reversing the district court. we explained that the district court had erred in granting the motion because it had failed to consider all of the circumstances in context and had instead analyzed each alleged instance of harassment separately. Apparently. *Vance* has now either been forgotten or is being ignored. because the court today makes exactly the same mistake the district court made ten years ago").

The 11th Circuit agreed with the district court on issues 1-7. stating that "they were neither sexual in nature nor based on Dar Dar's sex". Petitioner states. however. awarding the seven issues to the Respondent is a manifest of

injustice because they were a part of the "environment" that contributed to the harassment that created the hostile work environment along with the other unmentioned acts[20]. The twenty one incidents may not have been gender based; however, they did form a part of the context of the 'environment' as a whole.

In the instant case, the district court and 11th Circuit's analysis is that only sexual conduct can be evaluated in context under the totality of the circumstances contrary to this Court's holding in *Harris v. Forklift, Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 37 (1993) and conflicts with other circuits on what conduct is considered under the totality of the circumstances. See *Hall v. Gus Construction, Co.*, 842 F.2d 1010, 1014 (8th Cir., 1988)(holding "the predicate act underlying a sexual harassing claim need not be clearly sexual in nature..."; *Vinson v. Taylor*, 753 F.2d 141, 36 FEP cases 1423, 1427 (D.C. Cir., 1985) aff'd. in part and reversed in part, 477 U.S. 57, 40 FEP cases 1822 (1986); *Broderick v. Ruder*, 46 FEP cases 2171 (D.C. 1988)(holding that evidence of the general work atmosphere, involving employees other than the plaintiff, is relevant of the issue of whether there exist an atmosphere of hostile work environment which violates Title VII).

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[20] App. 62, fn 31)

There seem to be conflict within the circuits as to what constitute a hostile work environment. In *Lehmann v. Toys'R' Us*, 132 N.J. 587, 592 (1993), the Court defined hostile work environment sexual harassment as: "discriminatory conduct that a reasonable person of the same sex in plaintiff's position would consider sufficiently severe or pervasive to alter the conditions of employment and to create an intimidating, hostile working environment. One cannot inquire whether the alleged conduct was "severe or pervasive" without knowing how severe or pervasive it must be. The answer to that question lies in the other prongs: the conduct must be severe or pervasive enough to make a reasonable woman believe that the conditions of employment are altered and her working environment is hostile".

The N.J. Supreme Court clarified what the other prongs were, this Court must establish a uniform and predictable standard as a matter of law because most circuit have altered and or ignored this Court's holding in *Harris*, 510 U.S. 17, 21 (1993).

. . . .

CONCLUSION

For the foregoing reasons, this Court should **GRANT** the Petition For A Writ Of Certiorari.

Dated: January 27, 2008

Respectfully submitted.

Geraldine Dar Dar, Pro Se
Post Office Box 7102
Tampa, Florida 33673
Telephone (813)931-8503

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

GERALDINE DAR DAR,
Plaintiff-Appellant,

v.

No. 07-10618DD
(D.C.No.8:04-01055
SCB-TBM)(M.D.F)
(Filed: Oct. 30, 2007)

ASSOCIATED OUTDOOR
CLUBS, INC. d/b/a Tampa
Greyhound Track
Defendant-Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF FLORIDA

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

ORDER

BEFORE: **BLACK, CARNES** and **MARCUS**,
Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rule of Appellate Procedure), the Petition for Rehearing En Banc is **DENIED.**

ENTERED FOR THE COURT
/s/ [Illegible]

ORD-42

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

GERALDINE DAR DAR,
Plaintiff-Appellant

No. 07-0618DD
(D.C. No.8:04-01055
v. SCB-TBM)(M.D.F)
Filed: Sept. 7. 2007)

ASSOCIATED OUTDOOR
CLUBS, INC. d/b/a Tampa
Greyhound Track
Defendant-Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF FLORIDA

ORDER

Before **BLACK, CARNES** and **MARCUS**, Circuit Judges.

PER CURIAM:

Geraldine Dar Dar appeals the district court's judgment in favor of her former employer, AOC, in her hostile work environment sexual harassment case, brought pursuant to the Florida Civil Rights Act and Title VII[1]. This is Dar Dar's second appeal in this matter.

Before the first appeal, the district court granted summary judgment for AOC on Dar Dar's retaliation claim and found that most of the incidents which formed the basis of her hostile work environment claim were insufficient at a matter of law to support such a claim. As to the remaining incidents, where Dar Dar's coworkers touched her buttocks, the district court concluded that they could be severe enough to have subjected her to a hostile work environment. The district court conducted a bench trial on the remaining incidents and, at the end of it, entered judgment for AOC.

Dar Dar appealed the judgment for AOC, arguing that the district court erred: 1) in granting summary judgment for AOC on her retaliation claim; 2) in granting summary judgment on her hostile work environment claim to the extent that she relied on incidents other

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[1] The FCRA is patterned after Title VII, and thus federal case law dealing with Title VII is applicable to employment discrimination claims brought under Florida law. *Mamica vs. Brown*, 171 F.3d 1364, 1368 n. 2 (11th Cir., 1999). Therefore, Dar Dar's FCRA claim will analyzed together with the Title VII claim.

than the buttocks touching; and 3) in granting judgment to AOC at the subsequent bench trail on the hostile work environment claim based on the buttocks touching incidents.

We affirmed the summary judgment for AOC on her retaliation claim and agreed with the district court that the majority of incidents alleged by Dar Dar to have created a hostile work environment were insufficient as a matter of law to support such a claim. However, we reversed the court's summary judgment as to two of the incidents found by the court to be insufficient as a matter of law to support a hostile work environment claim -- the inappropriate comments made by Robert Diaz and Tony Guzman -- concluding that these, together with the buttocks touching incidents, raised a genuine issue of material fact as to Dar Dar's hostile work environment claim.

We vacated the judgment and remanded for the district court to determine whether the following alleged acts subjected Dar Dar to a hostile work environment: 1) Dar Dar being touched repeatedly on her buttocks by co-workers; 2) Diez asking Dar Dar if she had seen or worn panties with a "built-in butt; 3) Guzman telling Dar Dar that he had seen an individual's "whale of a dick" in the restroom. *Dar Dar v. AOC*, No. 06-10245 (11th Cir., Oct. 23, 2006). On remand, the district court found without further evidentiary proceeding that these acts, taken as a whole, did not establish that Dar Dar was subjected to a hostile work environment.

Dar Dar contends that this Court erred in the first appeal by not directing the district on remand to consider evidence of the other non-sexual incidents that we concluded in the first appeal were insufficient as a matter of law to support a hostile work environment claim and to consider AOC's alleged failure to take effective action to address Dar Dar's complaints. Because we have already ruled on these matters, however, we are bound by the law of the case to reject this contention. "The law of the case doctrine bars relitigation of issues that were decided, either explicitly or by necessary implications, in an earlier appeal of the same case". *United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir., 2005). Although, exceptions exist, such when "we are convinced [that] our decision in the prior appeal is clearly erroneous and following it would work a manifest injustice," none of them are present in this case. Id.

Dar Dar's second contention is similar to the first, in that it essentially challenges one of our rulings in the first appeal. Dar Dar contends that we erred in affirming the district court's grant of summary judgment to AOC on the retaliation claim. See *Dar Dar*, No. 06-10245, at 11. For the same reasons her first contention is barred by the law of the case doctrine, this one is also.

Dar Dar's third contention is that the district

court failed to consider the "built-in butt" and "whale of a dick" comments and the touching of her buttocks under the totality of the circumstances analysis, as we directed it to do. See id. To the contrary, the district court explicitly considered all of the circumstances in concluding that the facts alleged by Dar Dar did not establish a hostile work environment claim under the FRCA or Title VII. For example, the court said:

> [Even] if Capitano and/or Reker's touching could be considered sexual in nature or based on Plaintiff's sex, consideration of their conduct in addition to Diaz and Guzman's comments would not change the outcome in this case, because it is clear to the court that these incidents, considered together, were not so severe or pervasive that they materially altered the conditions of Plaintiff's employment.
>
> (emphasis added)

Finally, Dar Dar challenges the district court's legal conclusion that she did prove that all of the alleged sexual harassment together created a hostile work environment by a preponderance of the evidence. We review "the district court's ...analysis of law de novo". *Doe v. Dekalb Co. Sch. Dist.*, 145 F.3d 141, 1445 (11th Cir., 1998).

Title VII prohibits "hostile work environment" sexual harassment. See *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1279 (11th Cir., 2003). To establish a prima facie case of hostile work environment, a plaintiff must show that: 1) she belongs to a protected group; 2) she has been subject to unwelcome harassment; 3) the harassment was based upon her sex; 4) the harassment "was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive work environment"; and 5) the employer is responsible for such an environment. Id at 1279-80.

The Supreme Court has identified four factors to consider in determining whether harassing conduct is sufficiently severe or pervasive to alter an employee's terms and conditions of employment:1) frequency of the discriminatory conduct; 2) the severity of the conduct; 3) whether the conduct; "is physically threatening or humiliating, or a mere offensive utterance; and 4) whether the conduct "unreasonably interferes with an employee's work performance" *Harris v. Forklift Sys Inc.* 510 U.S. 17, 23, 114 S.Ct. 367, 371, (1993).

There were two sexual inappropriate comment and two incidents of intentional buttocks touching over the course of 22 months. In *Gupta v. Fla. Bd. of Regents*, over the course of six or seven months.

the male supervisor of a female professor repeatedly called her at home, once complimented her appearance, twice stared at her, once placed his hand on her knee, once touched the hem of her dress, once touched her ring and bracelet, and repeatedly asked her out to lunch. 212 F.3d 571, 585 (11th Cir., 2000).The Court held that the supervisor's conduct, while perhaps "annoying or inappropriate," was not sufficiently serious to support a sexual harassment claim. Id. The two incidents of employees touching Dar Dar's buttocks – in one of which the touched was a woman in her seventies – and the two risqué comments are no more serious than the conduct we held did not establish a hostile work environment in Gupta. As the Supreme Court has stated, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment". *Farragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 2283 (1998) (citation omitted). The district court did not err in finding that Dar Dar failed to prove that the alleged sexual harassment created a hostile work environment.

AFFIRMED.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

GERALDINE DAR DAR,
Plaintiff-Appellant

No. 07-10618DD
(D.C.No.8:04-01055
v. SCB-TBM(M.D.F.)
(Filed: June 14, 2007)

ASSOCIATED OUTDOOR
CLUBS, INC. d/b/a Tampa
Greyhound Track
Defendant-Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF FLORIDA

ORDER

BEFORE: **WILSON** and **PRYOR**, Circuit Judges.

BY THE COURT:

Appellant's motion to reinstate this appeal is **GRANTED.**

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

GERALDINE DAR DAR,
Plaintiff-Appellant

No. 06-10245DD
(D.C.No.8:04-01055
v. SCB-TBM)(M.D.F.)
Filed: May 18, 2007)

ASSOCIATED OUTDOOR
CLUBS, INC. d/b/a Tampa
Greyhound Track
Defendant-Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF FLORIDA

ENTRY OF DISMISSAL

Pursuant to 11th Cir.R.42-2(c), this appeal is hereby dismissed for want of prosecution because the appellant has failed to file the record excerpts within the time fixed by the rules, effective this 18th day of May, 2007.

THOMAS K. KAHN
Clerk of the United States Court
Of Appeal for the Eleventh Circuit
By: Regina Veals -Gillis.
Deputy Clerk

FOR THE COURT BY DIRECTION

ORD-40

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTICT OF FLORIDA

GERALDINE DAR DAR.
Plaintiff.

v.

D.C. No. 8:04-01055
SCB-TBM
(Filed: Jan. 10. 2007)

ASSOCIATED OUTDOOR CLUBS, INC. d/b/a Tampa Greyhound Track
Defendant.

ORDER

This cause comes before the Court on the Eleventh Circuit's opinion in this case reversing in part and vacating and remanding in part this Court's order granting partial summary judgment and this Court's judgment after a bench trial. **(Doc. No. 134)**

I. Background

Plaintiff worked for Defendant. Associated Outdoor Clubs, Inc., as a pari-mutuel clerk. where she was responsible for punching tickets and assisting customers. Plaintiff filed suit

against Defendant, alleging that it subjected her to a sexually hostile work environment and retaliation against her for complaining about the harassment in violation of Title VII and the Florida Civil Rights Act. **(Doc. No. 18)**. Defendant moved for summary judgment on all claims.

With respect to Plaintiff's hostile work environment claims, Plaintiff identified numerous incidents that she characterized as discriminatory, including 1) co-workers touching her buttocks when they passed by her; 2) a co-worker, Tony Guzman, telling Plaintiff that he saw a man in the men's restroom unzip his pants and "a whale of a dick fell in the water", and 3) a co-worker, Bobby Diaz, asking Plaintiff is she wore "panties with the butt built into them." The Court granted Defendant's motion for summary judgment on Plaintiff's hostile work environment claims to the extent that the claims were based on any incidents other than the allegation that co-workers were touching Plaintiff's buttocks when they passed by her. **(Doc. No. 77)**. Plaintiff's hostile work environment claims based on the alleged touching of her buttocks proceeded to a non-jury trial.

After the trial, the Court made the following findings of fact and conclusion s of law **(Doc. No. 121)**: The evidence at trial showed that

Plaintiff only took issue with two people that touched her buttocks: Jean Reker and Joe Capitano. Both Reker and Capitano were Plaintiff's co-workers; they were also mutuel clerks.

The evidence at trial showed that Reker, a very petite Asian woman who was approximately seventy years old and carried an oxygen tank, touched Plaintiff's buttocks once in March of 2002. The touching occurred after Plaintiff had accused Reker of touching her buttocks. Reker had not touched Plaintiff's buttocks prior to Plaintiff's accusation, so Reker slapped Plaintiff's buttocks to show her what "touching" was. Thereafter, Reker apologized to Plaintiff.

The evidence at trial showed that Capitano accidently touched Plaintiff's buttocks a few times when he walked past her, since the walkways behind the windows where the mutuel clerks stood were narrow, leaving little room to walk. Specifically, the Court notes that Capitano testified that he only accidentally touched Plaintiff's buttocks once or twice, despite Plaintiff's contention that he touched her buttocks on several occasions. The Court found Capitano's testimony that he accidentally touched Plaintiff's buttocks while walking past her to be credible and the Court found that Plaintiff did not show that his touching occurred frequently.

The Court found in favor of Defendant on Plaintiff's hostile work environment claims. Specifically, the Court found that Reker's alleged improper touching was not sexual in nature, and as such, it could not support a hostile work environment claim. Additionally, the Court found that Plaintiff did not meet her burden of showing that Capitano's conduct was so severe or pervasive that it materially altered the conditions of Plaintiff's employment. Instead, the Court found that Capitano's conduct merely consisted of accidentally touching Plaintiff's buttocks when he walked past her in a narrow walkway.

Thereafter, Plaintiff appealed the Court's summary judgment order and the Court's reverse judgment that was entered after the bench trial. The Eleventh Circuit reversed in part, vacated and remanded in part, and affirmed in part.

Specifically, the Eleventh Circuit reversed this Court's summary judgment order as to the granting of summary judgment on Plaintiff's hostile work environment claims to the extent that the claims were based on Guzman and Diaz's comments. The Eleventh Circuit stated that when determining whether conduct is sufficiently severe or pervasive, courts must examine the conduct in context and determine under the totality of the circumstances whether the harassing conduct is sufficiently severe or

pervasive to create a hostile work environment. The Eleventh Circuit found that because this Court denied summary judgment on Plaintiff's hostile work environment claims to the extent that they were based on the alleged touching of her buttocks, this Court could not grant summary judgment to the extent that the hostile work environment claims were based on Guzman and Diaz's comments[2]

In reversing this Court on this issue, the Eleventh Circuit stated that this Court did not need to conduct any additional evidentiary proceedings on remand if it determines that even if Plaintiff's allegations about Guzman and Diaz's comments are true, that conduct, when added to the evidence of Reker and Capitano's touching of Plaintiff's buttocks, did not equate to sexual harassment.

Because of the reversal of that part of the summary judgment order, the Eleventh Circuit also vacated this Court's order entering judgment in favor of Defendant on Plaintiff's hostile work environment claims after the bench trial. As a result, the Eleventh Circuit remanded the case for a determination as to whether the consideration of

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[2] However, the Eleventh Circuit noted that if Plaintiff's only allegations of harassment were Diaz and Guzman's comments, it would readily agree that those incidents were not even close to severe and pervasive enough to alter the terms and conditions of Plaintiff's employment.

Guzman and Diaz's comments alters the Court's resolution of the hostile work environment claims.

II. Consideration of Guzman and Diaz's Comments

In responding to Defendant's motion for summary judgment, Plaintiff submitted the following evidence regarding Guzman and Diaz's comments: Plaintiff alleged that Guzman sexually harassed her in January of 2002 by telling her that he saw a man in the men's restroom unzip his pants and "a whale of a dick fell in the water". (Pla. depo. p. 106). Plaintiff thought that Guzman told her the story because she is a woman, so she asked him to tell the story to a male co-worker, Marlow Spivey. (Pla. depo. p 108). Guzman repeated the story to Spivey.

Additionally, Plaintiff alleges that on November 9, 2002, she punched a ticket for Diaz. (Pla. depo. p. 171). When Diaz walked away, Guzman and Evie Perez stopped Diaz and spoke to him in Spanish[4]. (Pla. depo. p. 171). Thereafter, Diaz came back over to Plaintiff and asked her if she wore "panties with the butt built into them". (Pla. depo. p. 172). Plaintiff saw Guzman and Perez giggling while this was occurring. (Pla. depo. p.

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[4] Plaintiff does not speak Spanish and does not know what Guzman and Perez said to Diaz. (Pla. depo. p. 172)

172). Plaintiff got angry with Diaz and told him that it was none of his business. (Pla. depo. p. 172-73).

Upon considering this evidence of Guzman and Diaz's comments in addition to the evidence submitted at trial of Reker and Capitano's touching of Plaintiff's buttocks, the Court finds that Plaintiff still has not proven by a preponderance of the evidence that the alleged sexual harassment resulted in a hostile work environment. As previously stated, the Court found that Capitano's conduct merely consisted of his accidentally touching Plaintiff's buttocks a few times when he walked past her in a narrow walkway. However, since Capitano's touching of Plaintiff was accidentally, it was arguably not sexual in nature or based on Plaintiff's sex. Instead, Capitano's touching was an unfortunate result of a narrow walkway.

However, even if Capitano and/or Reker's touching could be considered sexual in nature or based on Plaintiff's sex, consideration of their conduct in addition to Diaz and Guzman's comments would not change the outcome in this case, because it is clear to the Court that these incidents, considered together, were not so severe or pervasive that they materially altered the conditions of Plaintiff's employment. In determining whether a workplace environment is "hostile" or "abusive", the Court must look at all

the circumstances, including the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating; and whether it unreasonably interfered with Plaintiff's work performance[1]. Only extreme conduct amounting to a material change in the term and conditions of Plaintiff's employment is actionable[2].

The Court finds that Reker, Capitano, Diaz, and Guzman's conduct did not occur frequently, their conduct was not severe, their conduct was not physically threatening or humiliating, and their conduct did not reasonably interfere with Plaintiff's work performance. As such, when considering Reker and Capitano's touching in addition to Diaz and Guzman's comments, the Court cannot find that the incidents were anything other than isolated incidents and "[g]enerally speaking, 'isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.'" *Walton v. Johnson & Johnson, SVC., Inc.* 347 F.3d 1272, 1285 n.12 (11th Cir. 2003) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Title VII is no a "'general civility code.'" *Gupta v. Florida Board of Regents*, 212 F.3d 571, 583 (11th Cir.

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[1] Pattern Jury Instruction 1.2.2, Eleventh Circuit Pattern Jury Instructions (Civil), 2005 edition

[2] Pattern Jury Instruction 1.2.2, Eleventh Circuit Pattern Jury Instructions (Civil), 2005 edition

2000)(quoting *Faragher*, 524 U.S. at 788). Accordingly, the Court finds in favor of Defendant on Plaintiff's hostile work environment claims.

III. Conclusion

The Court has now considered the conduct of Reker, Capitano, Diaz, and Guzman under the totality of the circumstances, and the Court finds that Plaintiff has not proven by a preponderance of the evidence that the alleged sexual harassment resulted in a hostile work environment. As such, the Court adopts and incorporates by reference its prior order entering judgment in favor of Defendant **(Doc. No. 121)** and again directs the Clerk to enter judgment in favor of the Defendant on all of Plaintiff's claims.

DONE AND ORDERED at Tampa, Florida, this 10th day of January, 2007.

/s/ Susan C. Bucklew
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

GERALDINE DAR DAR,
Plaintiff-Appellant

v.

No. 06-10245DD)
(D.C.No. 8:04-01055
SCB-TBM) (M.D.F.)
(Filed: Nov 29, 2006)

ASSOCIATED OUTDOOR
CLUBS, INC. d/b/a Tampa
Greyhound Track
Defendant-Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF FLORIDA

ORDER

BEFORE: **DUBINA, CARNES** and **HULL**,
Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellee, Associated Outdoor Club, Inc. is **DENIED**.

ENTERED FOR THE COURT:
/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

GERALDINE DAR DAR,
Plaintiff-Appellant

v.

No. 06-10245DD
(D.C. No. 8:04-01055
SCB-TBM) (M.D.F.)
(Filed: Oct. 23, 2006)

ASSOCIATED OUTDOOR
CLUBS, INC. d/b/a Tampa
Greyhound Track
Defendant-Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF FLORIDA

ORDER

BEFORE: **DUBINA, CARNES** and **HULL,**
Circuit Judges.

PER CURIAM:

Geraldine Dar Dar, proceeding pro se, filed suit in the United States District Court of the Middle District of Florida against her formal employer, AOC, alleging hostile work environment and retaliation claims under Title VII of the Civil Rights Act of 1964, U.S.C. §§2000e-2(a) and 3(a). She subsequently amended her complaint to add, among others, claims under the Florida Civil Rights Act of 1992 (FCRA)[6] Dar Dar alleged ten incidents of conduct, described below, that she contends established a hostile work environment. She also alleged that AOC retaliated against her for complaining about this conduct. AOC moved for summary judgment on both the hostile work environment and retaliation claims. The district court granted summary judgment as to nine of the incidents of conduct Dar Dar alleged. It denied summary judgment as to the remaining incidents of conduct and as to the retaliation claim. The court then conducted a bench trial, finding in favor of AOC on Dar Dar's remaining claims.

Dar Dar appeals both the partial grant of summary judgment and the adverse judgment entered after the bench trial. She argues that the district court erred in approximately thirteen ways. These arguments are best divided into three general contentions: 1) that the district

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[6] Florida modeled its civil rights act after Title VII, and Florida courts have subsequently applied Title VII case law to the FCRA. *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998). Consequently, the analysis of Title VII case law in this opinion applies to Dar Dar's FCRA claims as well.

court erred in granting partial summary judgment, 2) that the court erred in entering judgment for AOC on the hostile work environment claim, and 3) that the court erred by entering judgment for AOC on the retaliation claim. We consider each position in turn.

I

Dar Dar's first contention is that the district court erred by granting summary judgment to AOC as to most of the alleged incidents of harassment. She argues that each incident is relevant to establishing a hostile work environment and that the district court incorrectly considered the alleged incidents of sexual harassment in isolation rather than as a whole. We review de novo the district court's grant of summary judgment. *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1345-46 (11th Cir. 2005).

Dar Dar alleged that while working as a pari-mutuel clerk at AOC, d/b/a Tampa Greyhound Track, she was subjected to a sexual harassment because: 1) a male clerk poked her in the side, 2) her co-workers asked her to accompany them for drinks after work, 3) clerk Tony Guzman asked her if she wanted a woman to bring her food like his girlfriend, clerk Charlyn Brodie, had brought him food, 4) Guzman bumped her on the shoulder after she complained to management about him, 5) she saw Brodie and Guzman on the street she lived on, 6) unknown people let air out of her tires,

7) she witnessed a female clerk bring in a magazine that sold underwear with a "built-in-butt", 8) clerk Robert Diez asked her whether she had ever seen such an apparatus, 9) Guzman told her that while he was in the men's restroom, he saw an individual's "whale of a dick", and 10) she was touched repeatedly on her buttocks by other clerks, including Joe Capitano, a male, and Jean Reker, a female.

The district court granted summary judgment as to all but the last incident of conduct, the repeated touching of Dar Dar's buttocks by other clerks. It found that the first seven incidents were not based upon Dar Dar's sex, and that incidents eight and nine – Diez asking Dar Dar if she had ever seen a "built-in-butt" and Guzman commenting about seeing a "whale of a dick" – were isolated incidents not sufficiently severe or pervasive to create a hostile working environment. The court concluded that Dar Dar's allegations that people kept touching her buttocks, however, created a genuine issue of material fact for trial. We agree with the district court that summary judgment was appropriate as to the first seven incidents. We hold, however, that incidents eight and nine should not have been resolved at summary judgment under the circumstances of this case.

Title VII prohibits "hostile work environment" sexual harassment. See *Walton v. Johnson &*

Johnson Serv., Inc. 347 F.3d 1272, 1279 (11th Cir. 2003). To establish a prima facie case of hostile work environment sexual harassment, a plaintiff must show that: 1) she belongs to a protected group, 2) she has been subject to unwelcome harassment, 3) the harassment was based upon her sex, 4) the harassment "was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive work environment," and 5) the employer is responsibility for such an environment. Id at 1279-80

The Supreme Court has identified four factors to consider in determining whether harassing conduct is sufficiently severe or pervasive to alter an employee's terms or conditions of employment: 1) "the frequency of the discriminatory conduct", 2) the severity of the conduct, 3) whether the conduct "is physically threatening or humiliating, or a mere offensive utterance [,] and" 4) whether the conduct "unreasonably interferes with the employee's job performance." *Harris v. Forklift Sys. Inc.* 510 U.S. 17, 23, 114 S. Ct. 367, 37 (1993).

"Establishing that harassing conduct was sufficiently severe or pervasive to alter an employee's terms or conditions of employment includes a subjective and an objective component." *Mendoza v. Borden, Inc.* 195 F.3d 1238, 1246 (11th

Cir. 1999). Whether the objective component has been satisfied "can be determined only by looking at all the circumstances". *Harris*, 510 U.S. at 23, 114 S. Ct. at 371. Courts must "examine the conduct in context, not as isolated acts, and determine under the totality of the circumstances whether the harassing conduct is sufficiently severe or pervasive" to create a hostile working environment. *Mendoza*, 195 F.3d at 1246.

Dar Dar's first seven instances of alleged harassment are easy to resolve. The district court found that they were neither sexual in nature nor based on Dar Dar's sex. We agree. However, the district court found that they were neither sexual in nature nor based on Dar Dar's sex. However, the district court dismissed incidents eight and nine – Diez asking Dar Dar if she had ever seen "built-in-butt" and Guzman commenting about seeing a "whale of a dick" - for a different reason. It considered each incident in turn and found them each to be:" isolated". This method of analysis is inconsistent with Supreme Court and circuit precedent. Both the Supreme Court and this circuit have held that the severity and pervasiveness of "harassing conduct" is judged "under the totality of the circumstances". *Mendoza* 195 F.3d at 1246; *Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75, 81, 118 S. Ct. 998, 1002-103 (1998); *Harris*, 510 U.S. at 23, 114 S.Ct. at 371. The district court should have examined

incidents eight, nine and ten "in context, not as isolated acts". *Mendoza*, 198 F.3d at 1246. Breaking the alleged harassing conduct down act-by-act (and then concluding that each act is "isolated" is a bit like executing a self-fulfilling prophecy; every act viewed individually appears isolated.

Applying the totality of the circumstances test, we hold that incidents eight and nine cannot be resolved at the summary judgment stage. If Dar Dar's only two allegations were of Diez and Guzman's crude comments, we would readily agree with the district court that these instances are not even close to severe enough or pervasive enough to alter the terms or conditions of Dar Dar's employment. But Dar Dar also alleged that she was touched repeatedly on her buttocks by other clerks and the district court found that this allegation raised a genuine issue of material fact for trial. It is impossible for incident ten to survive summary judgment and for incidents eight and nine to falter. If Dar Dar's allegations that she was touched on her buttocks was, by itself, sufficient to create a genuine issue for trial under the totality test, then this allegation plus two additional allegations of sexual conduct must necessarily do so as well.[7] Consequently, we **AFFIRM** the district court partial grant of

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[7] By contrast, the district court's grant of summary judgment on the first seven incidents is proper. Because those incidents were not sexual in nature, they do not constitute "harassing conduct" to which the totality of circumstances test can be applied. *Mendoza*, 195 F. 3d

summary judgment as to incidents one through seven and **REVERSE** it as to incidents eight and nine.

However, the district court need not conduct any additional evidentiary proceedings on remand if it determines that even if Dar Dar's allegations about incidents eight and nine are true, that conduct when added to incident ten still does not total sexual harassment. We leave that decision to the district court.

II

Dar Dar's second contention is that the district court erred in entering judgment for AOC on her hostile work environment claim. Because the district court did not consider evidence of two relevant instances of conduct at trial, we cannot determine how it would have ruled had it done so. Therefore, we **VACATE** the order entering judgment on Dar Dar's hostile work environment claim and **REMAND** for a determination as to whether consideration of these additional instances alters the court's resolution of that claim. What we said in the previous paragraph about the possibility that no new evidentiary proceedings will be required applies here as well.

III

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at 246 (applying the test of severity and pervasiveness to "harassing conduct.")

Finally, Dar Dar contends that the district court erred when it entered judgment for AOC on her retaliation claim. "We review the district court's findings of fact for clear error and its analysis of law de novo". *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1445 (11th Cir. 1998) (reviewing bench trial of claim brought pursuant to the Americans with Disabilities Act); Fed. F. Civ. P. 52(a) (stating that a district court's findings of fact in a bench trial "shall not be set aside unless clearly erroneous"). "Findings based on the credibility of witness demand even greater deference to the trail court's findings...." *Burrell v. Bd. of Trs. Of Ga. Military Coll.*, 125 F.3d 1390, 1394 (11th Cir. 1997) (quotation omitted). Furthermore, "[w]hen there is two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous". Id (quotation omitted).

Dar Dar alleged that AOC retaliated against her by 1) terminating her employment in May 2003 after she complained about the harassment in November 2002, and 2) creating a supervisor's log in January 2003, which contained three complaints against her two for being rude to customers and one for refusing to serve a customer.

In order to establish a claim of retaliation, Plaintiff must prove by a preponderance of the evidence that: 1) she engaged in a statutorily protected activity, 2) an adverse employment

action occurred, and 3) the adverse action was related to her protected activities. *Coutu v. Martin County Bd. of County Comm's.*, 47 F.3d 1068, 1074 (11th Cir. 1995). To constitute an adverse action, an "employer's challenged action..... would have [to have] been material to a reasonable employee." *Burlington N. & Santa Fe Ry., Co. v White*, __ U.S. __, __, 126 S.Ct. 2405, 2410 (2006) (internal quotation omitted). Material actions are those that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." Id at 2409.

The district found that Dar Dar's complaints of harassment could constitute statutorily protected activity and that her termination was an adverse employment action.[*] However, the court concluded that she had failed to prove causation by a preponderance of the evidence. The district court did not clearly err.

Dar Dar last complained of harassment in November, 2002, but she was not terminated until May 2003. The length of time between her complaints and her termination weighs against a

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[*] The district court did not explicitly address Dar Dar's claim that the creation of the supervisor's log was an adverse action. It was not. The creation of a complaint log only becomes "material to a reasonable employee" once the employer uses that log as the basis for disciplining or terminating the employee. *Burlington*, U.S. at , 126 S.Ct. at 2409. Thus, Dar Dar's termination was the adverse action, not the creation of the complaint log.

finding of causation. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74, 121 S.Ct. 1508, 1511 (2001) (relying on cases that held a 3-month period and a 4-month period were insufficient to support causation to hold that the 20-month period the court was also insufficient). Dar Dar elicited testimony from a former manager that one of her supervisors at the track felt that she complained too much and was looking to fire her. However, the former manager's statement occurred sometime in 2001, approximately a year-and-a-half prior to Dar Dar's termination. During the intervening time, Dar Dar received multiple complaints for behaving rudely to customers and for refusing to serve a customer. The district court explicitly determined that AOC's managers were credible when they testified that Dar Dar was terminated based on these complaints. We grant deference to the credibility determinations of the district court, *Burrell*, 125 F.3d at 1394, and find that it did not clearly err. We therefore **AFFIRM** the judgment in favor of AOC on Dar Dar's retaliation claim.

REVERSED, in part, **VACATED** and **REMANDED** in part, and **AFFIRMED** in part.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

GERALDINE DAR DAR,
Plaintiff-Appellant

v.

No. 06-10245DD
(D.C.No. 8:04-01055
SCB-TBM)(M.D.F.)
(Filed: Feb. 14, 2006)

ASSOCIATED OUTDOOR
CLUBS, INC. d/b/a Tampa
Greyhound Track
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

ORDER

The motion for an extension of time to file the appellant brief and record excerpts, up to and including May 22, 2006 is **GRANTED**.

/s/ Standley F. Birch
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTICT OF FLORIDA

GERALDINE DAR DAR,
Plaintiff.

v.

D.C. No.8:04-01055
SCB-TBM
(Filed: Dec. 7, 2005)

ASSOCIATED OUTDOOR CLUBS, INC. d/b/a Tampa Greyhound Track
Defendant.

ORDER

This cause comes before the Court on Plaintiff's Motion for New Trial. **(Doc. No. 125).** The Court conducted a non-jury trial in this case on November 21-22, 2005 and found in favor of Defendant on Plaintiff's hostile work environment and retaliation claims.

Federal Rule of Civil Procedure 59(a) provides that a new trial may be granted in an action tried without a jury for any of the reasons for which rehearings have been granted in suits in equity in the courts of the United States. Upon consideration of the arguments raised in her

motion. Plaintiff's Motion for New Trial **(Doc. No. 125)** is **DENIED.**

DONE AND ORDERED at Tampa, Florida, this 7th day of December, 2005.

/s/ Susan C. Bucklew
UNITED STATES
DISTRICT JUDGE

Copies:
Counsel of Record
Pro Se Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTICT OF FLORIDA

GERALDINE DAR DAR,
Plaintiff,

v.

D.C. No. 8:04-01055
SCB-TBM
(Filed: Nov 23, 2005)

ASSOCIATED OUTDOOR CLUBS, INC. d/b/a Tampa Greyhound Track
Defendant.

ORDER

This matter comes before the Court on a non-jury trial that was held on November 21-22, 2005. After considering all of the evidence, the pleading filed by the parties, the arguments made by counsel and Plaintiff[1], and the legal authorities submitted to the Court, the Court makes the following findings and conclusion of law. To the extent that any of the findings of fact might constitute conclusions of laws, they are adopted as such. Conversely, to the extent that any conclusions of law constitute findings of fact, they are adopted as such.

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[1] Plaintiff preceded pro se in this matter.

I. FINDINGS OF FACT

Plaintiff began working for Defendant, which operates and owns the Tampa Dog Track ("the Track"), in July of 1999 as a roving teller. Six months later, she became a mutuel clerk. During her employment at the Track, there was not a written sexual harassment policy in effect.

Plaintiff contends that she was subjected to a sexually hostile work environment because people kept touching her buttocks. The evidence at trial shows that Plaintiff was only takes issue with two people that touched her buttocks: Jean Reker and Joe Capitano.[10] Both Reker and Capitano were also mutuel clerks.

Plaintiff contends that her co-worker, Reker, a very petite Asian woman who is approximately seventy years old and carries an oxygen tank, touched her buttocks in March of 2002. Plaintiff and Reker testified to conflicting versions of events, and the Court finds Reker's version more credible. According to Reker, Plaintiff accused Reker of touching her buttocks. Reker had not touched Plaintiff's buttocks prior to Plaintiff's accusation, so Reker then slapped Plaintiff's

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[10] The only other people touched Plaintiff's buttocks were Robert Diez and Victor Malozi. Diez accidentally touched Plaintiff's buttocks once and apologized, and Plaintiff accepted his apology and told him not to do it again. Malozi accidentally touched Plaintiff's buttocks one time, but she did not notice that it had happened.

buttocks to show her what "touching" was. Thereafter, Reker apologized to Plaintiff. The one time that Reker slapped Plaintiff's buttocks was the only time that Reker touched Plaintiff's buttocks.

Plaintiff also contends that her co-worker, Capitano, a fifty-eight year old man, touched her buttocks several occasions. Capitano testified that he never intentionally touched Plaintiff and that he only touched her buttocks once or twice accidentally. Plaintiff conceded that Capitano never slapped, grabbed or squeezed Plaintiff's buttocks but that he touched her buttocks when he would walk past her. The evidence presented during the trial through the testimony of many witnesses employed at the Track was that the walkways behind the windows where the mutuel clerks stood were narrow, leaving little room to walk. Therefore, Capitano's testimony that he accidentally touched Plaintiff's buttocks while walking past her is credible.

Plaintiff complained about people touching her buttocks to her supervisors (Howard Chesser, Victor Malozi, Orland "Pete" Berkobein and Ed Gilley). Plaintiff felt that her supervisors were not handling her complaints properly, and she spoke with Larry Hall (the Mutuel Manager) on November 9, 2002. No one touched Plaintiff improperly after she spoke with Hall on November 9, 2002).

Plaintiff was terminated on May 19, 2003 (Pla. Ex. No. 55). Defendant contends that it fired Plaintiff for being rude to customers and other employees.[1] The Track's rules state that mutuel clerks cannot refuse to wait on any customer that comes to their window, and if they do, they will be fired. (Pla. Ex. No. 53, p. 000013). Additionally, the Track rules state that employees must be courteous to all customers regardless of the situation, and the failure to do so could result in termination (Pla. Ex. No. 53, p. 000017).

On February 8, 2003, Howard Chesser, one of Plaintiff's supervisors, reprimanded Plaintiff for being rude to a customer. (Pla. Ex. No. 50, p.80. Chesser warned Plaintiff that if there was one more complaint, he would fire her. (Pla. Ex. No. 8).

Thereafter, on Friday, May 16, 2003 at 5:30 p.m., Willie Jackson came to Plaintiff's window to make a bet on a race that was going to begin at 7:00 or 7:30 that night. Since it was Plaintiff's lunch hour and the race was not about to begin, she told Jackson to go to another teller to make the bet. Jackson walked away and called Plaintiff a name. Thereafter, two other customers came to

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[1] Mary Horton, Plaintiff's co-worker who worked beside Plaintiff at the east walk location, testified that she complained about Plaintiff to the supervisors more than once. Specifically, she complained about Plaintiff's mood swings, which made it hard for Horton to work with Plaintiff.

Plaintiff's window to bet on races, and she took their bets. When Plaintiff returned from lunch, her supervisor, Andre Latrielle, spoke with Plaintiff about her refusal to wait on Jackson, because Jackson had sought out Latrielle to complain about Plaintiff to him. (Pla. Ex. No. 50, p. 14, May 19, 2003 entry)[12]

On Saturday, May 17, 2003, Chesser told Plaintiff that there was a customer complaint logged against her and that she should not come to work on Monday until he determined what would be done about the complaint. On Monday, May 19, 2003, Chesser called Plaintiff and told her she was fired. Ed Gilley, the head supervisor at the Track, testified that after Plaintiff was fired on May 19, 2003, another customer, Josh Mannis, complained about Plaintiff[13] (Pla. Ex. No. 56).

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[12] The Supervisors Log, which was created in 2003, is a log of incidents that occurred at the Track, although not all incidents are logged into the Supervisor Log. Page 14 of the Supervisors Log was altered sometime after June 1, 2005 when Gilley crossed out Josh Mannis' name from the May 24, 2003 entry and inserted the name Willie Jackson. (Pla. Ex. No. 50, p. 14; Pla. Ex. No. 56). Gilley testified that he erroneously crossed out Josh Mannis' name from the May 24, 2003 entry, when in fact it was Josh Mannis that complained about Plaintiff on that date. The Court notes that Chesser gave conflicting testimony regarding whether the May 24, 2003 entry refers to Mannis or Jackson, but given Plaintiff's testimony regarding the events that occurred on May 16, 2003 with Willie Jackson, the Court finds that the May 19, 2003 entry is based on Jackson's complaint and the May 24, 2003 entry is based on Mannis' complaint.

[13] Additionally, Chesser testified that prior to the creation of the Supervisors Log, there were many customer complaints about Plaintiff. Specifically, customers complained that Plaintiff was rude and that she would wait on whoever she wanted. Mary Horton, one

Plaintiff contends that she was not fired for being rude to customers and employees, but instead, she was fired because she complained about people touching her buttocks. In support of her contention, Robert Meissner, a supervisor at the Track during 2001, testified that after Plaintiff complained to him about people touching her buttocks, he notified Larry Hall of Plaintiff's complaints sometime between September and December of 2001. Meissner testified that Hall responded that Plaintiff always complains and they were looking to fire her.

II. CONCLUSION OF LAW

The only claims that have survived summary judgment are 1) Plaintiff's hostile work environment claim based on Reker and Capitano touching her buttocks in violation of Title VII and the Florida Civil Rights Act ("FCRA").[14] After a non-jury trial, the Court finds that judgment should be entered in favor of Defendant on both claims.

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of Plaintiff's co-worker and a mutuel clerk, also testified that Plaintiff was nice to the tipping customers and would act differently towards the non-tipping customers. Additionally, Horton testified that Plaintiff would pick and choose who she would wait on.

[14] Florida's Civil Rights Act is patterned after Title VII, and thus Federal case law dealing with Title VII is applicable to employment discrimination claims brought under Florida law." *Manicchia v. Brown*, 171 F.3d 1364, 1364, 1368 n. 2 (11th Cir. 1999)(citation omitted).

A. Hostile Work Environment

In order to succeed on her hostile work environment claim, Plaintiff must prove by a preponderance of the evidence that she was subjected to a sexually hostile working environment. A work environment is hostile or abusive because of sexual harassment only if 1) Plaintiff was subjected to sexually offensive acts or statements; 2) such acts or statements were unwelcome and had not been invited or solicited, directly or indirectly, by Plaintiff's own acts or statements; 3) such acts or statements resulted in a work environment that was permeated with discriminatory intimidation, ridicule or insult of sufficient severity or pervasiveness that it materially altered the conditions of Plaintiff's employment; 4) a reasonable person, as distinguished from someone who is unduly sensitive, would have found the workplace to be hostile or abusive; and 5) Plaintiff personally believed the workplace to be hostile or abusive[5].

The Court finds that Plaintiff has not proven by a preponderance of the evidence that the alleged sexual harassment resulted in a hostile work environment. The Court finds that Reker's alleged improper touching was not sexual in nature, and as such, it cannot support a hostile work environment claim.

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[5] Pattern Jury Instruction 1.2.2, Eleventh Circuit Pattern Jury Instruction (Civil), 2000 edition

Furthermore, the Court finds that Plaintiff has not shown by a preponderance of the evidence that Capitano's conduct was so severe or pervasive that it materially altered the conditions of Plaintiff's employment. The Court notes that in determining whether a workplace environment is "hostile" or "abusive", the Court must look at all of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating and whether it unreasonably interfered with Plaintiff's work performance.[16]

Additionally, the Court notes that only extreme conduct amounting to a material change in the terms and conditions of Plaintiff's employment is actionable[17].

In this case, however, the Court finds that Capitano's alleged conduct was not physically threatening, nor did Plaintiff show by a preponderance of the evidence that it was frequent. Instead, the Court finds that Capitano's conduct merely consisted of accidentally touching Plaintiff's buttocks when he walked past her in a narrow walkway, and his conduct was not of such an extreme nature as to amount to a material change in the terms and conditions of Plaintiff's employment.

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[16] Pattern Jury Instruction 1.2.2, Eleventh Circuit Pattern Jury Instruction (Civil), 2000 edition

[17] Pattern Jury Instruction 1.2.2, Eleventh Circuit Pattern Jury Instruction (Civil), 2000 edition

Furthermore, the Court finds that a reasonable person would not have found the workplace to be hostile or abusive. While the Court acknowledges that Plaintiff subjectively perceived the workplace to be hostile or abusive, the Court finds that objectively, the workplace was not hostile or abusive.

Accordingly, for the reasons stated above, the Court finds that Plaintiff has failed to prove by a preponderance of the evidence that she was subjected to a sexually hostile work environment. As such, judgment will be entered for Defendant on Plaintiff's hostile work environment claims.

B. Retaliation

In order to establish a claim of retaliation, Plaintiff must prove by a preponderance of the evidence: 1) that she engaged in [a] statutorily protected activity, 2) that an adverse employment occurred, and 3) that the adverse action was causally related to [her] protected activity." *Coutu v. Martin County Board of County Commissions*, 47 F.3d 1068, 1074 (11th Cir. 1995). The Court finds that Plaintiff engaged in statutorily protected activity when she complained about conduct that she believed constituted sexual harassment, with the last complaint occurring on November 9, 2002. Additionally, the Court finds that Plaintiff's termination on May 19, 2003 was

an adverse employment action. Plaintiff, however, has failed to prove by a preponderance of the evidence that her termination was causally related to her complaints about the alleged sexual harassment.

For an adverse employment action to be "causally related" to a statutorily protected activity, Plaintiff must show that, but for the protected activity, the adverse employment action would not have occurred.[18] Stated another way, Plaintiff must show that her complaints about the alleged sexual harassment were a substantial, motivating cause that made a difference in Defendant's decision to fire her.[19] Plaintiff has not met her burden.

Plaintiff's last complaint of sexual harassment occurred more than six months prior to her termination. The Court finds that the length of time between her complaints and her termination weigh against a finding that there is a causal connection between the two. See *Balletti v. Sun-Sentinel Co.*, 909 F.Supp. 1539, 1549 (S.D. Fla. 1995)(stating that the employee's discharge, which occurred six months after her complaint of sexual harassment, was not temporally close enough to support an inference of a causal connection).

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[18] Pattern Jury Instruction 1.9.3, Eleventh Circuit Pattern Jury Instruction (Civil), 2000 edition

[19] Pattern Jury Instruction 1.9.3, Eleventh Circuit Pattern Jury Instruction (Civil), 2000 edition.

While Plaintiff contends that the causal connection can be shown by Meissner's testimony that Hall stated that Plaintiff complained too much and they were looking to fire her, the Court notes that Meissner testified that this discussion with Hall occurred between September and December of 2001-approximately a year-and-a-half prior to Plaintiff's termination. Furthermore, the Court notes that Plaintiff was fired right after Willie Jackson complained about her, which supports Defendant's contention that it fired Plaintiff for being rude to customers. As such, the Court finds that Defendant's purported reason for firing Plaintiff-that she was rude to customers and other employees-was credible.

Furthermore, the Court finds that Plaintiff has failed to prove by a preponderance of the evidence that her complaints about the alleged sexual harassment were a substantial, motivating cause that made a difference in Defendant's decision to fire her.

Plaintiff attempted to show that other employees were not terminated for being rude to customers, and as such, Defendant's purported reason for firing her must be pretextual. The Court, however, rejects this argument, because the other employees were not similarly situated. Furthermore, the Court notes that even if it disagreed with Defendant's decision to fire

Plaintiff, such cannot support a retaliation claim, since "[f]ederal courts 'do not sit as a super-personnel department that reexamines an entity's business decisions'" Elrod v. Sears, Roebuck & Co., 939 F.2d 1366, 1470 (11th Cir. 1991)(quoting Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir. 1988)).

Accordingly, for the reasons stated above, the Court finds that Plaintiff has failed to prove by a preponderance of the evidence that Defendant retaliated against her for complaining about the alleged sexual harassment. As such, judgment will be entered for Defendant on Plaintiff's retaliation claims.

III. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that the Clerk is directed to enter judgment in favor of Defendant on all of Plaintiff's claims and to close this case.

DONE AND ORDERED at Tampa, Florida, this 23rd of November, 2005.

/s/ Susan C. Bucklew
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTICT OF FLORIDA

GERALDINE DAR DAR,
Plaintiff,

v.

D. C. No. 8:04-01055
SCB-TBM
(Filed: July 25, 2005)

ASSOCIATED OUTDOOR
CLUBS, INC. d/b/a Tampa
Greyhound Track
Defendant.

ORDER

This cause comes before the Court on two motions: 1) Defendant's Motion for Summary Judgment **(Doc. No. 63)** and 2) Plaintiff's motion to disregard Defendant's affidavits filed in support of its motion for summary judgment **(Doc. No. 66)**. Both motions are opposed. **(Doc. No. 75, 76)**.

I. MOTION TO DISREGARD AFFIDAVITS

Plaintiff moves for the Court to disregard the affidavits filed by Defendant in support of its motion for summary judgment. Plaintiff

contends that the affidavits should be disregarded, because they contradict deposition testimony. However, most of the inconsistencies pointed out by Plaintiff are between one person's affidavit and a different person's deposition testimony. While such inconsistencies may show that there is a genuine issue to material fact, they do no show that the person's affidavit should be disregarded.

The only clear inconsisteney between a person's affidavit and their own deposition testimony is Joe Capitano's statement in his affidavit that he only bumped into Plaintiff once. **(Doc. No. 63, Capitano Affidavit, 7).** However, in his deposition, Capitano stated that he bumped into Plaintiff a couple of times. **(Doc. No. 67).** Capitano depo. p. 5-6). As such, the Court will not consider this portion of his affidavit that conflict with his deposition testimony.[20]

II. MOTION FOR SUMMARY JUDGMENT

Defendant moves for summary judgment on Plaintiff's sexually hostile work environment

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[20] However, since Capitano's affidavit and deposition testimony conflicts with Plaintiff's deposition testimony that Capitano touched he butt approximately twice a week, and since the Court must view the evidence in the light most favorable to Plaintiff when evaluating Defendant's motion for summary judgment, this issue is moot, because the Court will base its decision on Plaintiff's version of the facts since they conflict with Capitano's version of the facts of this issue.

and retaliation claim. For the reasons stated below, the motion is granted in part and denied in part.

A. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the non-moving party's case. Id. at 325.

When a moving party has discharged its burden, the non-moving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file, "designate specific facts showing there is a genuine issue for trial. Id. at 324. In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that

it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the non-movant and resolve all reasonable doubts in that party's favor. See *Samples on behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988).

B. Background

Plaintiff was hired by Defendant, Associated Outdoor Club, Inc. doing business as Tampa Greyhound Track, in July of 1999. In January of 200, Plaintiff became a pari-mutuel clerk, and she was responsible for punching tickets and assisting customers. Plaintiff contends that Defendant subjected her to a sexually hostile work environment and retaliated against her for complaining about the harassment.[21] While employed by Defendant, Plaintiff identifies numerous incidents that she characterizes as discriminatory.

Plaintiff alleges that in 2000, David Grant would walk by and poke her in the side with his finger. (Pla. depo[22], p. 30). Grant poked Plaintiff five to ten times during a six months period. (Pla. depo, p. 78-79). Plaintiff complained to two

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[21] Defendant did not have a written sexual harassment policy in place during Plaintiff's employment. **(Doc. No. 63, Hater Affidavit, ¶6).**

[22] Plaintiff's deposition transcript is filed as an exhibit to Doc. No. 63.

supervisors, Richard Monjovi and Ed Gilley, about Grant poking her. (Pla. depo. p. 30-31). After Plaintiff complained to Gilley, Grant stopped poking her. (Pla. depo. p. 76).

Additionally, Plaintiff alleges that during the simulcast season[3] of 2001, several co-workers would pass by her and touch her butt. (Pla. depo. p. 32). Initially, Plaintiff thought that they touched her butt because she was in their way. (Pla. depo. p. 30). However, since co-workers kept touching her butt, yet a significantly larger person (Howard Chesser) was able to pass by her without touching her butt, Plaintiff believes that people were touching her butt on purpose. (Pla. depo. p. 32). Plaintiff asked Chesser how he could pass behind her without touching her butt, and he put his head down and laughed, confirming Plaintiff's suspicious that people were touching her butt on purpose. (Pla. depo. p. 32). Plaintiff identified two co-workers by name that touched her butt, Jeannie Rekker and Joe Capitano.

Plaintiff alleges that Rekker touched her butt one day in 2002. (Pla. depo. p. 65-67). Plaintiff reported the incident to a supervisor, Pete Berkobein. (Pla. depo. p. 67-68). Additionally, Plaintiff alleges that Capitano began touching her butt while she was working at her station. (Pla. depo. p. 35, 90, 93, 100). Plaintiff told Capitano not to touch her, and she complained

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[3] The simulcast season runs from January to June each year.

about this to a supervisor, Howard Chesser. (Pla. depo. p. 40-41). However Capitano continued to touch her butt, and Plaintiff estimates that he touched her butt twice a week. (Pla. depo. p. 54, 93). Plaintiff repeatedly reported to management (including Ed Gilley, Vic Malozi, and Howard Chesser) that Capitano kept touching her butt. (Pla. depo. p. 94). During the live season[24] of 2002, Plaintiff put a chair behind her while she was working at her station, and this stopped Capitano from touching her butt. (Pla. depo. p. 96-97).

Plaintiff also alleges that Patty Bruner, Plaintiff's co-worker, brought a magazine to work in November, 2002. (Pla. depo. p. 54, 57). Plaintiff did not look at the magazine, but she believes that the magazine sold ladies' underwear with built-in-padding to enhance one's butt because she overheard her co-workers talking about it. (Pla. depo. p. 57, 58, 64). Plaintiff never told management about the magazine or that she was offended by it. (Pla. depo. p. 60).

Plaintiff also alleges that during the live season of 2000, her co-workers[25] would invite her out to

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[24] The live season runs from July to December each year.

[25] It is unclear as to who exactly invited her out. Plaintiff merely refers to these co-workers as "they" in her deposition.

go drinking after work. (Pla. depo. p. 81). Plaintiff was not singled out, other people were invited also. (Pla. depo. p. 82-83).

Plaintiff also alleges that Tony Guzman, Plaintiff's co-worker who sat next to her, sexually harassed her in January of 2002 by telling her that he saw a man in the men's restroom unzip his pants and "a whale of a dick fell in the water". (Pla. depo. p. 106). Plaintiff thought that Guzman told her the story because she is a woman, so she asked him to tell the story to a male co-worker, Marlow Spivey. (Pla. depo. p 108). Plaintiff reported the incident to Ed Gilley. (Pla. depo. p. 109).

Additionally, Plaintiff alleges that Guzman harassed her after Guzman's girlfriend, Charlyn Brodie, brought him a cup of soup and he said to Plaintiff, "wouldn't you like to have a woman do the things for you that Charlyn does for me?" (Pla. depo. p. 111). Plaintiff reported this incident to her supervisors. (Pla. depo. p. 111). Thereafter, Plaintiff alleges that Guzman brushed against her shoulder when he walked past her, and then Plaintiff and Guzman started screaming at each other in front of customers. (Pla. depo. p. 116, 124). A police officer came up and asked what was going on. (Pla. depo. p. 124). Plaintiff and the police officer went into a supervisor's office, and Plaintiff explained what had happened. (Pla. depo. p. 125). Howard Chesser was in the office while Plaintiff spoke with the police officer. (Pla.

depo. p. 126). A few days later, Guzman was moved away from Plaintiff's station and his girlfriend, Charlyn Brodie (Plaintiff's co-worker), was moved into Guzman's place. (Pla. depo. p. 128, 130).

Plaintiff alleges that about two weeks after Brodie moved next to her, Brodie came back from lunch and punched Plaintiff on the shoulder when she (Brodie) took her jacket off. (Pla. depo. p. 132-33). Plaintiff contends that her shoulder was bruised for two weeks. (Pla. depo. p. 133). Plaintiff reported the incident to Ed Gilley, and he determined that the incident was an accident. (Pla. depo. p. 133-34).

Plaintiff also alleges that during simulcast 2002, Brodie would park her car headlight to headlight with Plaintiff's car. (Pla. depo. p. 140, 143). Plaintiff believes that Brodie did this in an effort to intimidate Plaintiff for complaining about Brodie's boyfriend, Guzman. (Pla. depo. p. 143). Additionally, Plaintiff felt intimidated by Brodie and Guzman being on the street where Plaintiff lives.[26]

Plaintiff also alleges that during simulcast 2002, someone kept letting the air out of different tires of her car. (Pla. depo. p. 140, 151). However,

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[26] Plaintiff lives around the corner from the track. (Pla. depo. p. 194)

Plaintiff does not know who was doing it. (Pla. depo. p. 141). Additionally, Plaintiff alleges that on November 9, 2002, she punched a ticket for a co-worker named Bobby Diaz. (Pla. depo. p. 171). When Diaz walked away, Guzman and Evie Perez stopped Diaz and spoke to him in Spanish.[7] (Pla. depo. p. 171). Thereafter, Diaz came back to Plaintiff and asked her if she wore "panties with the butt built into them". (Pla. depo. p. 172). Plaintiff saw Guzman and Perez giggling while this was occurring. (Pla. depo. p.172). Plaintiff got angry with Diaz and told him that it was none of his business. (Pla. depo. p. 172-73). As the incident with Diaz occurred, Howard Chesser showed up. (Pla. depo. p.173). Later that same day, Plaintiff spoke with Larry Hall, a supervisor, about all of the incidents of alleged harassment. (Pla. depo. p.196-98). This was Plaintiff's last complaint of sexual harassment. (Pla. depo. p. 247).

Plaintiff contends that her supervisors and co-workers retaliated against her. Plaintiff contends that Brodie retaliated against her when Brodie punched Plaintiff in the shoulder after Plaintiff complained about Brodie's boyfriend, Guzman. (Pla. depo. p. 227).

Additionally, Plaintiff contends that Howard Chesser retaliated against her for complaining about the alleged sexual harassment by logging

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[7] Plaintiff does not speak Spanish and does not know what Guzman and Perez said to Diaz. (Pla. depo. p. 172)

three complaints against her. Chesser logged a complaint against Plaintiff by an unknown customer on February 10, 2003.[28] (Pla. depo. p. 212-13). The entry on February 10, 2003 states: "[Plaintiff] reprimanded for being rude to patron. She was warned for last time. One more complaint[.] out of here." **(Doc. No. 63, Ex.3)**

Chesser logged another complaint against Plaintiff on May 19, 2003. (Pla. depo. p. 215). The entry on May 19, 2003 states:"[Plaintiff] terminated; refusing to wait on customer"." (Doc. 63, Ex. 3). It appears that the incident referred to in the May 19, 2003 entry was an incident that occurred on May 16, 2003. On May 16, 2003, a customer, Larry Jackson, came to Plaintiff's station to make a bet; however, Plaintiff was leaving for lunch hour at that time. (Pla. depo. p. 220). Plaintiff told Jackson to go to the tellers inside since she was leaving for her lunch hour, and Jackson called her a "lazy mother fucker". (Pla. depo. p. 220).

Chesser logged another customer complaint against Plaintiff on May 24, 2003. (Pla. depo. p. 222). The May 24, 2003 entry states: "Customer [Josh Mannis] informs me that [Plaintiff] was a very rude individual an[d] very unpleasant". **(Doc. No. 63, Ex. 3).** Chesser contends that when Mannis found out that Plaintiff was

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[28] In her deposition, Plaintiff states that the complaint was logged on February 8, 2002, but the log book indicated that it was logged on Monday, February 10, 2003. (Doc. No. 63, Ex. 3)

terminated, he gave the complaint about her being rude. **(Doc. No. 67.** Chesser depo. p. 21).

Plaintiff also contends that Chesser, Ed Gilley, and Larry Hall retaliated against her for complaining about the sexual harassment by terminating her rather than handling her sexual harassment complaints. (Pla. depo. p. 224-25). Plaintiff was terminated on May 19, 2003). (Pla. depo. p. 225). In Plaintiff's Personnel Action Form, Larry Hall states that Plaintiff was terminated because she was rude to customers and other employees and the she had been warned repeatedly during the past year. **(Doc. No. 63, Ex. 4)**. Defendant has rules regarding employee behavior, which include the following:

> COURTESY - be courteous to all customers regarding the situation. This is absolutely mandatory. Employees will, at all times, act in a friendly and professional manner. Should any questions or misunderstandings arise over a situation you cannot resolve, do not create an argument orcause a disturbance. Call your supervisor or send for a Security Officer, but do not physically touch, hold or detain the customer.

(Doc. No. 63. Ex. 5). Additionally, Defendant's rules that provide that employees may not

refuse to wait on any customer that comes to their window and that if they do, they will be terminated. **(Doc. No. 63, Ex. 6).**

Plaintiff concedes that she has been reprimanded at work for arguing or yelling at co-workers. (Pla. depo. p. 230). Plaintiff also concedes that she was told that if she had one more outburst, she would be terminated.[29] (Pla. depo. p. 246). However, Plaintiff contends that these outburst/arguments only occurred whenever people touched her. (Pla. depo. p. 230-31, 72-74).

C. Analysis

Plaintiff alleges that Defendant subjected her to a sexually hostile work environment and retaliated against her for complaining about the harassment in violation of Title VII and the Florida Civil Rights Act. Defendant argues that it is entitled to summary judgment on Plaintiff's hostile work environment and retaliation claims. Accordingly, the Court will address each claim.[30]

1. Sexually Hostile Work Environment

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[29] It is unclear as to when she was told this.

[30] "Florida's Civil Rights Act is patterned after Title VII, and thus federal case law dealing with Title VII is applicable to employment discrimination claims brought under Florida law." *Maniccia v. Brown*, 171 F.3d 1364, 1368 n.2 (11th Cir. 1999) (citation omitted).

Plaintiff alleges that Defendant subjected her to a sexually hostile work environment due to the following incidents: 1) Grant poking her in her side, 2) people touching her butt, 3) Bruner bringing a magazine to work that sold ladies' underwear with built-in-padding, 4) co-workers inviting her to go out drinking after work, 5) Guzman telling her the story about a man's genitalia that he saw in the restroom, 6) Guzman asking her if she wanted a woman to do things for her like Brodie did for him (after Brodie brought Guzman a cup of soup), 7) Guzman brushing her shoulder as he waked past her, and 8) Diaz asking her if she wore underwear with the butt built into them.[3] In order to prove a sexually hostile work environment, "a plaintiff must show 1) that she belongs to a protected group; 2) that she has been subjected to unwelcome sexual harassment; 3) that the harassment was based on her sex; 4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and 5) that a basis for

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[3] Additionally, Plaintiff states in her deposition that the following incidents also created a hostile work environment, but these incidents were not addressed by Defendant: 1) Brodie and Guzman being on Plaintiff's street, 2) unknown people letting air out of Plaintiff's tire. The Court notes, however, that these incidents are clearly not actionable. Brodie and Guzman being on Plaintiff's street is not sexual in nature. Likewise, people letting air out of Plaintiff's tires is not sexual in nature, and the acts could have been done by anyone, including customers of the Track.

holding the employer liable exists." *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1244 (11th Cir., 2004) (citations omitted). Defendant argues that 1) Plaintiff cannot show that the harassment was sexual in nature or based on her sex, and 2) the alleged harassment was not sufficiently severe or pervasive.

a. Harassment Based on Plaintiff's Sex or Sexual in Nature

Defendant contends that Plaintiff cannot show that the harassment was sexual in nature or based on her sex. To the extent that Plaintiff argues that she was subject to a sexually hostile work environment due to the following incidents, the Court agrees with Defendant that these incidents were not based on Plaintiff's sex, nor were they sexual in nature: 1) Grant poking her in her side, 2) co-workers inviting her to go out drinking after work[12], 3)Bruner bringing a magazine to work that sold ladies' underwear with built-in padding, 4) Guzman asking her if she wanted a woman to do things for her like Brodie did for him (after brought Guzman a cup of soup), and 5) Guzman brushing her shoulder once as he walked past her.

b. Severe and Pervasive

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[12] Inviting someone to be part of a group going out to a bar is not evidence of sexual harassment. See *Gupta v. Florida Board of Regents*, 212 F.3d 571, 584 (11th Cir. 2000)

Defendant also contends that the alleged harassment was not sufficiently severe or pervasive. The "severe or pervasive" element has both a subjective and objective component "[t]he employee must 'subjectively perceive' the harassment as sufficiently severe and pervasive to alter the terms and conditions of employment, and this subjective perception must be objectively reasonable." *Mendoza v. Borden, Inc.* 195 F.3d 1238, 1246 (11th Cir. 1999) (citation omitted). While in the instant case, Plaintiff subjectively perceived the alleged harassment to be sufficiently severe and pervasive, the Court must determine whether her perception was objectively reasonable. With regards to the objective component, courts consider four factors" 1) frequency of the conduct; 2) the severity of the conduct; 3) whether the conduct is physically threatening or humiliating or a mere offensive utterance; and 4) whether the conduct unreasonable interferes with the employee's job performance". Id. (citation omitted). "[C]ourts should examine the conduct in context, not as isolated acts, and determine under the totality of the circumstances whether the harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment and create a hostile working environment." Id. (citation omitted). With regards to the remaining incidents that Plaintiff complains of, namely 1)

people touching her butt. 2) Guzman telling her the story about a man's genitalia that he saw in the restroom, and 3) Diaz asking her if she wore underwear with the butt built into them, the Court finds that Guzman and Diaz's comments are not actionable. Guzman and Diaz's comments were isolated incidents and "[g]enerally speaking, 'isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment'"[33] *Walton v. Johnson & Johnson Svcs, Inc.*, 347 F.3d 1272, 1285 n.2 (11th Cir. 2003) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1988)). Furthermore, Title VII is no a "'general civility code.'" *Gupta*, 212 F.3d at 583 (quoting *Faragher*, 524 U.S. at 788).

However, with regards to Plaintiff's allegations that people kept touching her butt, the Court finds that such conduct, if true, is sufficiently severe and pervasive, since Plaintiff that Capitano touched her butt approximately twice a week for several months.[34] The Court finds that given the

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[33] Additionally, arguably, Guzman did not tell Plaintiff the story because she is a woman, since he repeated it to Spivey, a man.

[34] The Court rejects Defendant's argument that it should be granted summary judgment on Plaintiff's hostile work environment claims based on people touching Plaintiff's butt, because Plaintiff's allegations are conclusory, and as such, the allegations cannot create a genuine issue of material fact. Plaintiff identified at least two of the people that touched her, when they touched her butt, and what she did in response.

frequency of the conduct and the fact that it was unwanted physical conduct, there is a genuine issue of material fact as to whether Plaintiff was subjected to a sexually hostile work environment due to people touching her butt.

Additionally, the Court notes that Defendant argues that the area where Plaintiff worked was narrow and that it was not uncommon for people to accidentally bump into each other. While it may be determined at trial that people did in fact accidently bump into Plaintiff's butt, the Court must construe the facts in the light most favorable to Plaintiff when considering a motion for summary judgment, and as such, the Court finds that there is a genuine issue of material fact as to whether people intentionally touched Plaintiff's butt.

c. Conclusion

Based on the above, the Court grants in part and denies in part Defendant's motion for summary judgment regarding Plaintiff's hostile work environment claim. The Court denies the motion only to the extent that Plaintiff contends that she was subjected to a sexually hostile work environment due to people touching her butt. However, the Court grants summary judgment in favor of Defendant regarding all of the other alleged incidents that Plaintiff contends created a sexually hostile work environment.

2. Retaliation

Plaintiff also argues that she was retaliated against by co-workers and supervisors due to her complaining about the alleged harassment. In order to establish a prima facie case of retaliation, a plaintiff must show "1) that she engaged in [a] statutorily protected activity, 2) that an adverse employment action occurred, and 3) that the adverse action was causally related to the plaintiff's protected activity". *Contu v. Martin County Board of County Commissioners*, 47 F.3d 1068, 1074 (11th Cir. 1995). Defendant contends that Plaintiff cannot show that she satisfies any of these elements. The Court disagrees.

The Court finds that Plaintiff's complaints about the butt touching, Guzman's story about a man's genitalia, and Diaz's comments about whether Plaintiff wore padded underwear were statutorily protected activity, the last of which occurred on November 9, 2002, when Plaintiff spoke with Larry Hall. Furthermore, Plaintiff was terminated on May 19, 2003, which is an adverse employment action. Finally, the Court finds that based on Robert Meissner's deposition testimony, there is a genuine issue of material fact as to whether Plaintiff's termination and her complaints of harassment were related.

Meissner was a supervisor at the Track. (Meissner depo.[35] p. 3). Plaintiff complained to him that people were touching her butt. (Meissner depo. p. 4-6). Meissner reported this to Larry Hall, who said not to worry about it because Defendant was looking to fire Plaintiff. Meissner states: "They did not give me a reason. They said she complains a lot and they were looking to fire her..." (Meissner depo. p. 17).

The Court notes that Defendant asserts a legitimate, non-discriminatory reason for terminating Plaintiff- failing to comply with customer courtesy. However, Plaintiff has brought forth evidence (in the form of Meissner's deposition testimony) that creates a genuine issue of material fact as to whether Defendant's purported reason is pretextual[36]. Accordingly, the Court denies Defendant's motion for summary judgment on Plaintiff's retaliation claim based on her termination.

However, to the extent that Plaintiff argues that Brodie retaliated against her by punching her in

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[35] Meissner's deposition is attached to **Doc. No. 67**.

[36] Additionally, the Court noted that Plaintiff argues that she was terminated due to her outbursts to co-workers, which occurred whenever they would touch her in a manner that she deemed inappropriate. **(Doc. No. 76**, p. 13). Furthermore, it appears that Plaintiff may be questioning the legitimacy of the complaints that occurred at the Track were logged. **(Doc. No. 76**, p 15-16, 20)

the shoulder after Plaintiff complained about her boyfriend, Guzman, the Court finds that Brodie's conduct cannot give rise to a retaliation claim. Brodie was Plaintiff's co-worker, and Brodie did not cause Plaintiff to suffer an adverse employment action by punching her in the shoulder. Defendant cites other incidents by co-workers that Plaintiff may be suggesting constitutes retaliation. However, Plaintiff's co-worker could not cause Plaintiff to suffer an adverse employment action, and as such, the Court grants Defendant summary judgment on Plaintiff's retaliation claims to the extent that they are based on conduct by the co-workers.

III. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that: 1) Defendant's Motion for Summary Judgment **(Doc. No. 63)** is **GRANTED IN PART AND DENIED IN PART.** The motion is denied to the extent that Plaintiff's hostile work environment claims are based on people touching her butt and to the extent that Plaintiff's retaliation claims are based on her termination; otherwise, the motion is granted. 2) Plaintiff's motion to disregard Defendant's affidavits filed in support of its motion for summary judgment **(Doc. No. 66)** is **GRANTED IN PART AND DENIED IN PART.**

DONE AND ORDERED at Tampa, Florida, this 25th day of July, 2005.

/s/ Susan C. Bucklew
UNITED STATES
DISTRICT JUDGE